United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-7380

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ARTHUR F. TURCO, JR.,

Plaintiff-Appellant,

v.

THE MONROE COUNTY BAR ASSOCIATION, THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, JOHN S. MARSH, REID S. MOULE, RICHARD W. CARDAMONE, HARRY D. GOLDMAN, RICHARD D. SIMONS, WALTER J. MAHONEY, FRANK DEL VECCHIO, and G. ROBERT WITMER, Presiding Justice and Justices of the Appellate Division of the Supreme Court, Fourth Judicial Department, and LESTER FANNING, Chief Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department,

Defendants-Appellees.

Civil Appeal
Docket No. 76-7380

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P/S

APPELLANT'S BRIEF
AND APPENDIX

MORTON STAVIS
DORIS PETERSON
c/o Center for Constitutional Rights
853 Broadway
New York, New York 10003
(212) 674-3303

Attorneys for Appellant

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether, since under New York law disbarment of an attorney is not automatic in the case of conviction of a misdemeanor but is subject to judicial determination as to whether the facts and circumstances of the conviction establish unprofessional conduct, appellant was denied due process in that the determination of unprofessional conduct in this case was made without a due process hearing, despite the fact that the convictions on their face had nothing to do with professional conduct?

2. Whether there was further denial of due process in that the Appellate Division, having denied appellant a hearing, as set forth above, then proceeded to base its determination upon a) charges not made, and b) statements of a prosecutor as to what certain witnesses might testify if called, although appellant disputed these contentions and such witnesses were never called and never subject to cross-examination?

3. Whether the Appellate Division denied appellant due process of law in refusing in the disbarment proceeding to allow proof of innocence although appellant's misdemeanor convictions were the result not of trial but pleas of guilt with a declaration of innocence, under the holding of the Supreme Court of the United States in Alford v. North Carolina?

4. Whether appellant was denied equal protection of the laws and due process in that the New York statutes deny a right of appeal to attorneys although every other litigant appearing before New York courts is permitted an appeal as of right, and whether such denial of equal protection and due process was confirmed when appellant sought and was denied discretionary appeal?

5. Whether the lower court in this case improperly refused to adjudicate federal Constitutional issues properly presented to it?

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Western District of New York, per Harold P. Burke, U.S.D.J., dismissing an Amended Complaint filed by Arthur F. Turco, Jr. (78a; not reported). The issues dealt with in the Amended Complaint arise out of an order of the Appellate Division of the Supreme Court of New York issued on January 28, 1975, which disbarred plaintiff-appellant Turco (hereinafter "appellant") after seven years in the practice of law (59a).

As can be readily observed from the Issues Presented for Review, the thrust of appellant's claim is that the Appellate Division violated fundamental Constitutional rights of appellant in the procedures which resulted in the order of disbarment. He sought relief from the District Court by way of injunctive and declaratory relief and asserted jurisdiction in that court under 42 U.S.C., §1981, et seq.

The case was decided by the District Court upon an Amended Complaint, a motion for temporary injunctive relief, and a cross-motion for dismissal. In this posture, there are no contested issues of fact and the allegations of the Amended Complaint must be taken as true. Indeed, the procedures before the State court which form the basis of appellant's Complaint in the Federal court are undisputed. Briefly stated, the facts are:

Mr. Turco was admitted to the New York Bar on December 21, 1967, in the First Department. He practiced law in the metropolitan area and its environs for several years and in August, 1971, moved to Rochester, where he was employed as an attorney

for the new Bail Fund established there. After six months, that employment terminated and he entered private practice in Rochester and vicinity (App. Div. opinion, 48a).

In April of 1972, pursuant to an order by Presiding Justice Harry Goldman of the Appellate Division, Alex Gossin, Esquire, a member of the Monroe County Bar Association Grievance Committee, was ordered to investigate and report to the Appellate Division two misdemeanor convictions concerning appellant (Amended Complaint, 62a).

Several times thereafter, Mr. Gossin spoke with appellant concerning the two misdemeanor pleas. Appellant explained all the surrounding circumstances of said pleas, and also informed Mr. Gossin that he could present evidence concerning his innocence. Mr. Gossin agreed to meet with appellant at a future time to examine said evidence (Amended Complaint, 62a-63a).

On May 8, 1973, in a petition filed in the Appellate Division, appellant was charged with having in February, 1972, in Maryland, entered a plea of "common law assault" (a misdemeanor for which he received a five-year suspended sentence). As noted in the petition, a wide range of charges, which went as far as conspiracy to murder, were withdrawn. The petition also charged that the following month appellant entered a plea of guilty in a New York court to the misdemeanor of unlawful possession of a weapon and that he was conditionally discharged (23a-24a). As in the case of Maryland, Mr. Turco was charged with other offenses but those charges were also withdrawn. Attached to the petition was an assortment of underlying documents, including transcripts

of the court proceedings, but nothing other than these two misdemeanor pleas was charged to appellant. Nor did the petition assert the truth of various unsupported statements made by the prosecutor in the Maryland proceedings and appearing in the transcripts attached to the petition. The petition specifically did not allege that appellant was guilty of any of the conduct attributed to him in any of the indictments which were withdrawn when he entered his misdemeanor pleas (e.g., conspiracy to murder in Maryland, or possession of drugs in New York).

In response to the petition, appellant moved to dismiss, or, in the alternative, for a full evidentiary hearing on the charges since he had interposed pleas of guilty under the case of North Carolina v. Alford, 400 U.S. 25, in which he was allowed to assert his innocence while taking the pleas (Amended Complaint, 63a).[1/]

1/ Appellant's Answer (not included in the record below but referred to by the Appellate Division) is a 63-page document denying his guilt of the offenses.

By separate motion, appellant has moved to enlarge the record by including three documents, as follows:

1) Mr. Turco's Answer to the Bar Association petition;

2) The transcript of the mitigation hearing referred to infra, p. 8.

3) The report of Mr. Justice Smith, who sat on the mitigation hearing.

With the motion, appellant has deposited with the Clerk four copies of these documents.

As set forth in the motion to enlarge the record, all of

[Footnote continued on next page.]

On these papers alone, and without a hearing, the Appellate Division, in a decision dated December 17, 1973, concluded "that respondent is guilty of professional misconduct in his office as an attorney and counselor at law" (28a) and "should be disciplined."

The Appellate Division expressly recognized that appellant in his pleadings sought "to prove that in fact he was not guilty of the charges to which he plead guilty" (29a).

In its order, the Appellate Division stated that appellant might have a mitigation hearing, if he so desired. Appellant proceeded with the mitigation hearing, which was held before the Honorable Lyman H. Smith, Justice of the Supreme Court appointed to conduct the hearing and to report his findings without a recommendation. The hearing developed extensive proof of appellant's good character through the testimony of an unusual array of witnesses (including judges, prosecutors, brother attorneys,

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these items are documents in the Appellate Division case, and probably subject to judicial notice in any event since the issue in the case is, in essence, a review of the procedures before the Appellate Division.

It is believed that the transcript was in the possession of the District Court Judge when he considered the case and thereafter returned by him and not filed in the record.

As explained in the motion to enlarge the record, appellant believes that the legal issues presented by the Complaint, the motion to dismiss, and the judgment below are determinable by this Court without reference to these documents, but he believes that they may assist the Court in an appraisal of some of the background of this case and may help to explain some of appellant's conduct.

Bar Association officers, etc.)[2], but by reason of the decision of the Appellate Division foreclosing the same, Judge Smith's report did not deal with the question of guilt or innocence of the underlying charges. As the Amended Complaint points out (63a), during the mitigation hearing there was no evidence whatsoever produced concerning appellant's guilt of the two misdemeanors, nor was there any evidence concerning anything negative about appellant's character. Since the Appellate Division had already adjudicated guilt and had expressly denied an opportunity to appellant to establish his innocence, the mitigation hearing did not include testimony of witnesses whom appellant said would establish his innocence (64a).

Mr. Turco's testimony at the hearing before Mr. Justice Smith at least explained how these guilty pleas came about. While the issues before this Court obviously concern only procedural questions and not the merits of appellant's defenses, nevertheless appellant has made his motion to enlarge the record because it may be appropriate to

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2/ The hearing included a probably unprecedented outpouring of support for a lawyer. There were 48 witnesses testifying on behalf of Mr. Turco, including a sitting United States District Court Judge, four sitting justices of the Supreme Court of New York, four sitting New York County Court judges, two sitting Rochester City Court judges, three sitting Justices of the Peace, a former Attorney General of the United States, four lawyers who were either then or had been trustees of the Monroe County Bar Association, the District Attorney of Cayuga County, the First Assistant District Attorney of Monroe County, the Bishop of the Episcopal Diocese of Rochester, and numberous other prominent lawyers and citizens of the community, all testifying to the extraordinary reputation for integrity and competence which Mr. Turco had earned. The Amended Complaint alleges these facts generally and they are undisputed. The transcript of the hearing and Mr. Justice Smith's report (the subject of the motion to enlarge the record) give the specific information above set forth

call the following matters to the attention of this Court as indicative at least of the bona fides of appellant's demand for a hearing in an effort to establish his innocence.

From appellant's testimony at that hearing (Volumes I and II) and the summary in his Answer, the following emerged as his explanation of the circumstances:

> The proceedings in Maryland arose out of a complex indictment which charged appellant and others with grave offenses, including conspiracy to commit murder, all arising out of a series of events involving the Black Panther Party, which appellant had been representing.
>
> Appellant was brought to trial but only after he had been held without bail for 10 months, most of which were spent in solitary confinement, which had a devastating impact upon his health. The jury disagreed. Appellant, who had been functioning as an attorney on behalf of the Black Panthers and who was the only white person among the defendants, alone was set for retrial by the prosecutor, all of his co-defendants having been acquitted or having had their cases dismissed at the request of the prosecutor.
>
> When he was called for retrial, appellant was given the choice of proceeding as the sole defendant on a charge of conspiracy to commit murder, assault with intent to murder, soliciting to commit kidnapping, and common law assault, or accepting a plea to a misdemeanor of assault with a commitment by the prosecutor that there would be a recommendation of no custodial sentence.
>
> Appellant, with a vigorous insistence of innocence of all charges made by his counsel on the record, opted for the plea of this minor charge, in the face of massive pretrial publicity and hysteria in the community which had been generated against him; legitimate fear for the safety of his family as a result of hate-group threats and intimidation from unidentified persons; repeated threats of bail revocation; a seriously ill wife; lack of funds to pay and retain local counsel; and the prosecutor's making it clear that if he did not plead to the minor misdemeanor charge, trial would be pressed on each of the foregoing grave charges involving aspects of

murder. 3/

But even this extraordinary choice, made with an assertion of innocence, was not resolved in appellant's mind until his counsel had first ascertained from the Bar Association of the City of New York that a plea to a misdemeanor would not result in automatic disbarment and that appellant would have an opportunity to explain the circumstances of his plea to a referee in the State of New York and to establish his innocence.

A similar situation obtained in New York, where Mr. Turco had been charged with possession of dangerous weapons, dangerous drugs, and hypodermic instruments. 4/ A guilty plea was entered to the misdemeanor of possession of a dangerous weapon, with an assertion of innocence, the plea being offered under the Supreme Court's decision in North Carolina v. Alford, 400 U.S. 25 (1970).

The foregoing pleas were entered in February and March of 1972 and concerned incidents which allegedly occurred in July, 1969, and February, 1970. By August of 1971, appellant had

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3/ Mr. Turco's claim of innocence with respect to the Maryland charges was based upon a solid alibi supported by the proffered testimony of at least eight individuals, most of whom plainly had no interest in the matter and whose testimony was buttressed by documentary evidence. By contrast, the testimony which the State said it would present repeated a story told at the first trial by the main prosecution witness, whose testimony the trial judge found so inconsistent with the documented facts that after cross-examination he struck completely all of his testimony as being incredible.

4/ The Appellate Division states appellant was also charged with obstructing government administration. That is not so.

To put the New York charges in perspective, it should be noted that the hypodermic instruments and accompanying insulin were demonstrably for appellant's diabetic condition and in pretrial proceedings their use as evidence was suppressed--a fact completely ignored by the Appellate Division. The dangerous drugs (majijuana) and dangerous weapons were not shown to be owned by Mr. Turco and he was charged solely because those items were found in an apartment in which he was temporarily staying. Beyond that, they were found in the owner's bedroom, which was not occupied by Mr. Turco, yet the owner was not charged!

Indeed, a total of 10 defendants were charged with criminal offenses out of this episode and all charges against defendants other than Mr. Turco were dismissed.

relocated to Rochester, Monroe County, New York, and had begun a successful and highly respected law practice.

Mr. Justice Smith's report without recommendation was filed on October 25, 1974 (64a). On January 28, 1975, the Appellate Division rendered its decision disbarring appellant (47a). As pointed out in appellant's Amended Complaint, the decision of the Appellate Division, disbarring appellant, contains over 14 pages[4a/] based upon mere allegations which the appellant, by the Appellate Division order, was precluded from refuting. Those allegations, unsupported by any evidence, are alleged in the Amended Complaint to be totally false (64a-65a).

As alleged in the Amended Complaint, the Appellate Division, by its order of December 17, 1973, did not allow appellant to go behind the two convictions to prove his innocence; however, by its decision, the Appellate Division went far behind that order and found as fact, mere allegations which the appellant was not even advised he was being charged with (65a).

The full import of these circumstances can only be gleaned from inspection of the opinion of the Appellate Division, which details all of the contentions of the Maryland prosecutor as to what he said he intended to prove if there were a retrial (51a et seq.). The Appellate Division then accepted those contentions as facts and based its decision thereon. Substantially the same was done by the Appellate Division with respect to the New York proceeding. And upon the basis of the foregoing, the Appellate Division considered the convictions--although only of

4a/ The figure 14 in the Amended Complaint referred to the typed copy of the Appellate Division's opinion. In the printed version reproduced in appellant's Appendix, it is eight pages.

minor misdemeanors--to be of such seriousness as to merit disbarment. In other words, the content or scope of the misdemeanors (which on their face were merely a simple assault and a weapons possession charge) were fixed by unsubstantiated proffers of proof.

Thus, the structure of the entire proceeding before the Appellate Division, as alleged in the Amended Complaint and not disputed, was such that appellant a) was not given notice that he was charged with having committed the acts attributed to him by prosecuting officials in their proffers, and b) was not given an opportunity to refute them when the Appellate Division decided to consider those matters, despite its having precluded Mr. Justice Smith from hearing testimony on those matters. Following the opinion of the Appellate Division, appellant filed an appeal as of right to the Court of Appeals, which was dismissed, 36 N.Y. 2d 490, 366 N.Y. Supp. 2d 1029, and sought leave to appeal, which was denied, 36 N.Y. 2d 642, 366 N.Y. Supp. 2d 1026.

Thereupon, while pressing a petition for a writ of certiorari before the Supreme Court of the United States, which was denied (423 U.S. 838), appellant filed the instant proceedings in the District Court, in which he alleged in detail his claims as to the denial of Constitutional rights in the procedures employed by the Appellate Division (65a-67a).

In response to the Complaint and thereafter the Amended Complaint, defendants, the Appellate Division and the justices and the chief clerk thereof, moved to dismiss (70a), as did the defendant, the Monroe County Bar Association (15a),

claiming that the Federal court lacked jurisdiction and that the Complaint failed to state a cause of action.

The Amended Complaint which appellant filed without leave of the court[5/] added as parties defendant the individual justices and the clerk of the Appellate Division (the original Complaint included only the Bar Association and the Appellate Division) in order to eliminate an issue as to whether the District Court had jurisdiction over the Appellate Division, as such. See, Erdmann v. Stevens, 458 F. 2d 1205, 1208 (this Circuit, 1972). The other issues raised by the motion to dismiss were not affected by the amendment.

In due course the lower court rendered its opinion sustaining the motion to dismiss, but continued pending this appeal the stay of disbarment of Mr. Turco (78a).

THE OPINION BELOW

The District Court's opinion refers to a number of the issues raised by appellant before it, but actually decided only the following:

1) that the denial of a right of appeal to disbarred attorneys did not constitute a denial of Constitutional rights, citing Levin v. Gulotta, 405 F. Supp. 182, aff'd., 47 L. Ed. 2d 751; and

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5/ Since no answer had been filed, such leave was unnecessary under Rule 15(a), F.R. Civ. P. See also, Kelly v. Delaware River Land Commission, 187 F. 2d 93 (3rd Cir., 1951); Thomas v. Pate, 493 F. 2d 151 (7th Cir., 1974); and Christophides v. Porco, 289 F. Supp. 403 (D.C. N.Y., 1968).

2) the lower court made one other comment, namely, "This court should not interfere in state disciplinary proceedings," citing Erdmann v. Stevens, 458 F. 2d 1205 (this Circuit, 1972), cert. den., 409 U.S. 889, and Anonymous v. Association of the Bar of the City of New York, 515 F. 2d 427 (this Circuit, 1975).

The foregoing reflects the entire decisional portion of the District Court's opinion.

ARGUMENT

I.

APPELLANT WAS DENIED DUE PROCESS OF LAW IN THAT HE WAS DENIED A HEARING ON THE QUESTION WHETHER A CONVICTION OF A MISDEMEANOR UNRELATED TO ATTORNEY MISCONDUCT ESTABLISHES UNPROFESSIONAL CONDUCT.

In Baxstrom v. Herold, 383 U.S. 107 (1966), Specht v. Patterson, 386 U.S. 605 (1967), and Humphrey v. Cady, 405 U.S. 504 (1972), the Supreme Court of the United States made clear that before a collateral consequence of a conviction could be imposed, a due process hearing was required to determine the issue as to whether that secondary consequence properly flowed from the conviction. Specht and Humphrey dealt with one who had been convicted of a sex offense and was facing additional and collateral punishment under a sex offense statute; Baxstrom involved commitment for mental incompetence following a conviction for crime.

In Specht, the Court quoted at length from Gerchman v. Maroney, 355 F. 2d 302, 312 (3rd Cir., 1966), where the court said:

> "'It is a separate criminal proceeding which may be invoked after conviction of one of the specified crimes. Petitioner therefore was entitled to a full judicial hearing before the magnified sentence was imposed. At such a hearing the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant in such a proceeding is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial, including the right to confront and cross-examine witnesses against him.' Gerchman v. Maroney, [supra]."

This case presents the issue as to the application of the foregoing principles to lawyer discipline as a collateral consequence of a prior conviction of a misdemeanor for conduct not as a lawyer. In New York, as in many other States (43 Cornell Law Quarterly, 489, 490 (1958)), conviction of a felony results in automatic disbarment with no adjudication proceeding of any sort. But conviction of a misdemeanor does not necessarily but may bring about disciplinary consequences following a proceeding to determine whether the conviction establishes aspects of "moral turpitude." In re McNally, 252 App. Div. 550, 300 N.Y.S. 459, 460 (1937); In re Smith, 216 App. Div. 173, 213 N.Y.S. 751 (1926). 6/

6/ Section 90 of the Judicial Law of the State of New York provides as follows:

> "(2) The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such

[Footnote continued on next page.]

In re Ruffalo, 390 U.S. 544, 550 (1968), establishes that a disciplinary proceeding of a lawyer is "of a quasi-criminal nature" and that the basic requirements of due process apply. 7/ Of course we recognize that "once it is determined that due process applies, the question remains what process is due." Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Goss v. Lopez, 419 U.S. 565 (1975). If, as in this case, the proceeding results in disbarment--effectively capital punishment as a lawyer--due process would certainly require notice and a hearing with an opportunity to present evidence relating to the crucial question, i.e., whether the conviction established unprofessional conduct.

The proceeding before the Appellate Division plainly lacked due process under the Baxstrom, Specht, and Humphrey doctrine because no hearing was ever afforded on the issue decided by the first decision of the Appellate Division dated December 17, 1973, wherein that court determined that the circumstances on which appeallant was convicted for misdemeanors in Maryland and

[Footnote continued from previous page:]

admission for any misrepresentation or supporession of any information in connection with the application for admission to practice. ***

"(4) Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law or to be competent to practice law as such."

7/ This Circuit has gone even further. It said in Erdmann v. Stevens, supra, 458 F. 2d at 1209-10:

"... [I]n our view a court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than a civil proceeding."

New York merited a finding of "guilt" of professional misconduct. It was in that decision that the Appellate Division adjudicated guilt of professional misconduct; everything thereafter was purely a mitigation hearing. But, as pointed out above, in New York, not every misdemeanor, and certainly not every assault or weapons conviction, establishes professional misconduct. It is rather the content of the conduct which is indicated by the conviction and the subsequent conduct of the individual which may or may not establish lack of professional responsibility. It is that very determination which requires a hearing and an adjudicative process which comports with due process of law. That was precisely denied by the Appellate Division when it acted solely upon the basis of a petition and answer, without affording a hearing before adjudicating guilt.

While we do not concede the point, we suppose it could be contended that some types of convictions of a lawyer require no further hearing to determine questions of an attorney's unprofessional conduct, e.g., theft of a client's money; but where one deals with misdemeanor convictions plainly outside of his functioning as an attorney, then it seems obvious that a due process hearing is required to bridge the gap between the conduct of which the attorney is convicted and the question whether that conduct can justify the finding of professional misconduct.

Many States seem to provide for a hearing on the question whether a particular misdemeanor conviction in lawyer discipline

cases establishes professional misconduct by express statute[8/] or by judicial decision.[9/] Although, as pointed out in fn. 8, there are a number of decisions requiring a due process hearing in this circumstance, there are only a few which contain any articulate discussion of the issue. The only cases we have found which discuss the issue make clear that a due process hearing is in fact required.

In In re Ming, 469 F. 2d 1352 (1972), the Seventh Circuit considered disciplinary proceedings against a lawyer who, after a trial, had been convicted on four counts of wilfully and knowingly failing to file federal income tax returns. Subsequently, a petition based on these convictions was filed, seeking his disbarment or suspension from the practice of law in the same court. Ming filed an answer, stating inter alia that he was not guilty of the offenses charged. Then, "without a hearing and with only the petition and the answer before it, the Executive Committee [of the United States District Court] ... suspended Ming from practice." 467 F. 2d at 1353. The Court of Appeals reversed

8/ Some State statutes specifically so provide: Ariz. R. Sup. Ct., §29(c) (1973); West Ann. Calif. Bus. & Prof. Code §6102(b) (1974); Colo. Rev. Stat. Ann. R. Civ. P., §258 (1973); La. Stat. Ann., Art. 15, ch. 4 app. (1974); Pa. Sup. Ct. R. 17-13, 17-14 (1974); S.D. Comp. L., ch. 16-19 (1967); Code of Va., §54-74(6) (1974); Wisc. Stat. Ann., §256.283-.285 (1971).

9/ People ex rel. Attorney General v. Edison, 100 Colo. 574, 69 P. 2d 247 (1937); In re Dampier, 267 P. 452 (1928); In re Grossgold, 58 Ill. 2d 9, 317 N.E. 2d 45 (1974); In the Matter of Sauer, 300 Mich. 449, 213 N.W. 2d 102 (1973); In re Burton, 257 N.C. 534, 126 S.E. 2d 581 (1962); In re Stolper, 185 Okla. 459, 94 P. 2d 832 (1939); In re Corcoran, 215 Ore. 660, 337 P. 2d 307 (1959).

because "the lack of a hearing before the Executive Committee constituted a denial of due process." Ibid.

Louisiana State Bar Association v. Ehmig, (La.) 277 So. 2d 137 (1973), dealt with disbarment for conviction of a "serious crime." The attorney in that case had been convicted after a trial of a tax fraud which was classified as a felony. The court held the attorney was entitled to a due process hearing on the issue whether this was a "serious crime." See also, In re Burton, 257 N.C. 534, 126 S.E. 2d 581 (1962); In re Lewis, 389 Mich. 668, 209 N.W. 2d 203 (1973); In the Matter of Sauer, 300 Mich. 449, 213 N.W. 2d 102 (1973).

This entire proceeding is bottomed upon a supposed assertion that the pleas of guilty to the two misdemeanors in some manner related to professional misconduct, but at no point in the entire proceeding prior to the adjudication by the Appellate Division in December, 1973, that he was "guilty of unprofessional conduct" was appellant ever given a due process hearing or any kind of hearing on that issue. The basic nexus between the convictions and the collateral consequences was not exposed to any kind of due process, despite Specht and the other cases.

II.

APPELLANT WAS DENIED DUE PROCESS OF LAW IN THAT IN A DISCIPLINARY PROCEEDING BEFORE THE APPELLATE DIVISION, DISBARMENT ENSUED a) FROM CHARGES NOT INCLUDED IN THE DISCIPLINARY COMPLAINT, b) FROM ASSERTIONS OF A PROSECUTOR UNSUPPORTED BY EVIDENCE, AND c) ON THE BASIS OF INDICTMENTS WHICH HAD BEEN WITHDRAWN.

In re Ruffalo, supra, dealt specifically with the requirements of "fair notice of the charge" in a lawyer disciplinary proceeding, as part of the overall entitlement to due process in such proceedings. Analysis of the details of the procedure before the Appellate Division in this case shows a pervasive denial of the elements of due process in every facet of the proceeding.

A.

The petition filed by the Bar Association charged Mr. Turco with conviction of two misdemeanors. But it is plain on its face that the Appellate Division decision of disbarment was based not on those convictions but on a charge of involvement in a conspiracy to murder and a charge of escape to Canada, both of which were expressly dropped.

Nothing in the petition filed by the Bar Association would give warning that it was pressing for discipline on charges other than those of which appellant had been convicted. While it is true that the petition had annexed to it transcripts of the court proceedings, the pleading shows that guilt of "unprofessional conduct" was being charged on the basis of the misdemeanor convictions and not upon any assertion that the material in the transcript was true.

Of course an attorney may be found guilty of unprofessional conduct in respect to actions which did not produce a conviction; but that was not the point of the petition. Had it been such, the issue before the Appellate Division would have been whether the attorney had committed the charged acts and proof of innocence would have been permitted. But the Appellate Division insisted it was proceeding only upon the basis of the convictions of misdemeanors, and indeed it did not permit him to go behind the convictions. Yet that is exactly what the Appellate Division did when its opinion emphasized that it viewed the matter as by no means involving a simple assault or a possession of weapons charge. Thus, disbarment was based not on convictions for misdemeanors with which appellant was charged, but on items of which he was not charged in the petition or permitted to refute.

This is precisely prohibited by In re Ruffalo, supra. We do not believe that the procedural constraints of that case may be overcome by the method of bifurcating the proceedings, i.e., a proceeding to establish guilt and then a separate proceeding relating to mitigation. If the net result of both proceedings is, as in this case, disbarment for matters not charged, then that is plainly prohibited by Ruffalo.

B.

The entire basis for the Appellate Division's disbarment ruling was the prosecutors' assertions of what they would have attempted to prove had there been a trial.

Such a procedure was entirely appropriate in the Maryland and New York misdemeanor proceedings involving the question

whether those courts would accept a guilty plea. But when the matter is moved to collateral consequences, how can mere assertions of a prosecutor, unsupported by evidence under oath and subject to cross-examination, be taken as fact?

Granted, as mentioned above, that once it is determined that due process applies, the question remains, "What process is due?", Morrissey v. Brewer, supra, the foregoing procedure does not meet even the most minimal standard of due process.

The judge in Maryland was quite aware of the shakiness of some of the State's witnesses and said so on the record.[10/] There appellant was willing that the prosecutor's statement be

10/ In the first trial, the main witness, Mahoney Kebe, told essentially the story repeated by the Appellate Division but his testimony was stricken when it was established that he was attributing to Mitchell a conversation with him in the presence of Turco about killing Anderson, which conversation was alleged to have occurred at Panther headquarters at a time when court and jail documents established both that Mitchell was in jail and that Turco was at the court house seeking to bail him out.

The prosecutor's statement at the taking of the plea did not change the essentials of the story; she simply indicated that other witnesses would supply the same story that Kebe had offered at the first trial. The statement of the prosecutor also relied on Sam Walters to repeat his testimony given at the first trial. On cross-examination at that trial, Walters admitted that at the direction of his superiors he had perjured himself by attributing to Turco acts which his typed reports showed had been committed by Mitchell and that, also at the direction of his superiors, he had altered reports in pencil to insert Turco's name. Walters was a police officer.

It should be noted that at the time of the entry of the plea there was a stipulation as to what the State witnesses would testify to, but obviously the stipulation referred only to their testimony on direct. At the first trial it was on cross-examination that their testimony was effectively shown to be untruthful. The trial judge at the acceptance of the plea acknowledged that "discrepancies were developed at some length on cross-examination."

accepted with his own counsel's assertion of innocence. But in this case he disputed those facts and yet the Appellate Division, without affording a hearing, assumed as proven fact what a prosecutor said he or she hoped to establish on direct and before cross-examination.

In Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963), after passing the Bar examination, an applicant was denied admission to the Bar because of an adverse report of the Character and Fitness Committee. The Committee had relied upon contradicted information supplied by informers whose credibility was challenged by the applicant and the applicant was never given the opportunity to confront and cross-examine the informers. The Supreme Court declared that this denied the applicant procedural due process.

In the instant case, appellant did not merely challenge the credibility of his accusers; he offered to present as part of the court record of the State of Maryland documented evidence that, among other things, during appellant's trial the prosecution's chief witness was proved to be so untrustworthy that the judge ordered his entire testimony stricken. In the light of Willner, appellant should have been given the opportunity to confront and cross-examine the witnesses the Grievance Committee relied on, especially where the evaluation of the charges brought against appellant depended upon estimates of credibility.

The New York courts have been zealous in protecting the rights of other professionals when they are being threatened with

the loss of livelihood without a meaningful due process hearing. In Aster v. Board of Education of the City of New York, 339 N.Y. 2d 903 (1972), which relied on Board of Regents v. Roth, 408 U.S. 564, the court held that a probationary teacher was denied a due process hearing with an opportunity to cross-examine adverse witnesses when her dismissal resulted in a loss of license and foreclosed her freedom to take advantage of other employment opportunities.

In Erdmann v. Ingraham, 280 N.Y.S. 2d 865 (1967), the court held that a physician was denied due process where, for alleged violations of Public Health laws, the Commissioner of Health accepted statements taken ex parte by its investigator without a cross-examination of the third party or the investigator by the physician.

Similarly, in Hecht v. Monaghan, 121 N.E. 2d 421 (1954), the court held that a taxi driver was denied a due process hearing where his license to drive a cab was revoked by an administrative tribunal with no opportunity afforded him to cross-examine his accuser.

Just how seriously the Supreme Court views the requirement of procedural due process is clear in its very recent opinion in Goss v. Lopez, supra, wherein it held that even suspension of a public school student for 10 days required notice and a hearing.

The interests at stake in an attorney disciplinary proceeding--a lawyer's reputation and livelihood--are at least as

important as the interests involved in the Willner, Aster, Erdmann, Hecht, and Goss proceedings. Similarly, the potential for abuse is equally present. It cannot be that the State can disbar an attorney (and ruin him for life) with less care and less due process than a school board may dismiss a teacher or suspend a student. In short, it cannot be said that an attorney is a lesser citizen, with lesser rights than anyone else. See, Spevack v. Klein, 385 U.S. at 516: "[L]awyers also enjoy first-class citizenship."

C.

It is evident that the basis upon which the Appellate Division disbarred appellant was for alleged conduct embodied within indictments which were withdrawn. We suppose that had the Bar Association undertaken to prove that, despite the withdrawal of the indictments, appellant nevertheless committed the alleged acts, that might have been an acceptable mode of attack. But in that case, the Bar Association would have been required to prove its contentions by the normal standards of an adversary proceeding, i.e., witnesses subject to cross-examination. The Bar Association certainly could not rely upon withdrawn indictments supported by unverified contentions by the prosecutor as to what he might have proved on direct and before cross-examination if he had not withdrawn the indictments. Yet that is exactly what occurred in this case.

III.

APPELLANT WAS DENIED DUE PROCESS OF LAW IN THAT, DESPITE A PLEA OF INNOCENCE MADE UNDER NORTH CAROLINA v. ALFORD, 400 U.S. 24 (1970), HIS ASSERTION OF INNOCENCE WAS IGNORED IN A BAR DISCIPLINARY PROCEEDING WHICH CONSIDERED THE COLLATERAL CONSEQUENCES OF A CONVICTION.

Aside from Constitutionally-mandated procedural requirements for the transition from a misdemeanor conviction to a finding of professional misconduct, there is the separate question of the binding nature of the conviction.

The general direction of the law as fixed by statute seems to be that at least in this field a misdemeanor conviction is "binding" or "conclusive" and the attorney may not go behind it.[11] But aside from the fact that such an approach seems to conflict with that applied in other fields of law,[12] a serious

11/ Ala. Code, Title 46, §§33, 49 (Supp. 1974); Ariz. R. Sup. Ct 29(c) (1973); Ark. Stat. Ann., §25-410 (1962); West Ann. Calif. Code Bus. & Prof. Code, §6101 (1974); Colo. Rev. Stat. Ann. R.C. Pro., §258 (1973); Code of Ga. Ann., Title 9, Disc. R., §9-501 (1973); Idaho Code, Title 3, §3-301 (1974); Iowa Code Ann., §610, 24 (Supp. 1974); Ky. Rev. Stat. Ann. R.Ct. App., §3.320 (1974); La. Rev. Stat. Ann., Art. 15, ch. 4, §8 (1974); Minn. Stat. Ann., §480.15 (1971); Miss. Code Ann., §73-3-339 (Supp. 1974); Mont. Stat.,§93-2017, et seq. (1973); Nev. Sup. Ct. R. 99 (1957); N.M. Stat., §18-1-20 (1953); Ore. Rev. Stat., §9.560-9.480 (Supp. 1975); S.D. Comp. L., §16-19-2 (1967); Utah Code Ann., §78-51-37 (1953); Rev. Code Wash. Ann., §2.48.220 (1961); Wisc. Stat. Ann., §256.283(7) (Supp. 1974); Wyo. Stat. Ann., Vol. 2A, R. Disc. Code X (1957). All the foregoing statutes deal with conviction of a misdemeanor involving moral turpitude or a serious crime.

12/ St. Paul Fire & Marine Ins. Co. v. Lack, 476 F. 2d 583 (4th Cir., 1973)(plea of guilty to manslaughter not binding in subsequent civil suit even though manslaughter is defined as intentional killing); semble, State Farm Mutual Auto Ins. Co. v. Worthington, 405 F. 2d 683 (8th Cir., 1969); Franklin Life Ins. Co. v. Strickland, 376 F. Supp. 280 (N.D. Miss., 1974); Kerr v. Commissioner of Internal Revenue, 351 F. 2d 1 (2d Cir., 1965)(plea of guilty to tax fraud not conclusive on government's claim for deficiency).

question is raised as to whether such an analysis comports with due process where there was no trial in the criminal proceeding and where there was an assertion of innocence--a procedure permitted by the Supreme Court under its ruling in Alford.

In Alford, the Court held that a plea of guilty may be accepted by a court despite a claim of innocence. As the Supreme Court there pointed out, there are many reasons why a defendant may choose that course, commonly a vast difference between the charge that would be pressed at trial and that for which a plea would be accepted.

But why does one press an assertion of innocence despite a plea of guilty? Obviously, the defendant may believe he is in fact not guilty and does not wish his plea to be binding upon him in a collateral proceeding. That is the basic design of the Alford plea.

The decision in Alford effectively loosened the joints of the criminal process by encouraging plea bargaining on the foregoing basis. This case presents the issue whether the entire design of an Alford plea may be frustrated by holding that the defendant is bound in a collateral proceeding as if he had admitted guilt or stood trial and been convicted.

We wish to emphasize that the issue is not whether guilty pleas are binding in the case in which they are entered: The issue is solely whether they are binding in a case dealing entirely with their collateral consequences. Alford's holding is precisely designed to permit a finding of guilt in a criminal case while leaving the collateral consequences open for subsequent

determination. After all, it is that distinction which explains why a person is willing to enter a guilty plea. To take away that distinction is to destroy the whole meaning of Alford.

In addition, because these pleas were entered in confident reliance upon the official declaration of the law as set forth in Alford, the denial of a full hearing on the issue of guilt constitutes "an indefensible sort of entrapment by the State," prohibited by Raley v. Ohio, 360 U.S. 423, 426 (1959), and Cox v. Louisiana, 379 U.S. 559 (1965). As the Supreme Court said, "convicting a citizen for exercising a privilege which the State had clearly told him was available to him" is a denial of due process. 360 U.S. at 425-26; 379 U.S. at 571. In the same way, appellant's disbarment by the New York court without an opportunity to substantiate his continued assertions of innocence to the prior charges penalizes him for acting in reliance upon the statement of law clearly expressed by the Supreme Court in Alford. Such a penalty is an unconstitutional denial of due process.

IV.

APPELLANT WAS DENIED EQUAL PROTECTION OF THE LAWS BECAUSE NEW YORK LAW PERMITS AN APPEAL OF RIGHT TO EVERY LITIGANT WHO APPEARS BEFORE ITS COURTS OTHER THAN AN ATTORNEY CHARGED UPON A DISCIPLINARY PROCEEDING BEFORE ONE OF ITS LOWER COURTS.

The foregoing issue was litigated in Mildner v. Gulotta and resulted in a divided opinion of a three-judge District Court panel, 405 F. Supp. 182 (S.D. N.Y., 1975), which was affirmed by the Supreme Court, 47 L. Ed. 2d 751. While the majority opinion may appear to have disposed of the issue, we believe it has in fact not done so.

The opinion of Judge Neaher emphasizes that abstention was the basis for his decision. It was the failure to exhaust State remedies and the failure to seek review of the petition for certiorari which led the panel to its determination. The penultimate paragraph of the majority opinion makes this unmistakeable:

> "In concluding that we ought to abstain in these cases I am not unmindful that it would be more expeditious for all concerned if this court, now well familiarized with the issues raised, were to rule on the merits of the claims, from which a direct appeal to the Supreme Court would lie, 28 U.S.C. §1253, MTM, Inc. v. Baxley, 420 U.S. 799, 95 S. Ct. 1278, 1281, 43 L. Ed. 2d 636 (1975), rather than relegate plaintiffs to State remedies which may no longer exist. But expedience cannot overcome the principle that, for sound policy reasons tied to the unique and peculiarly State-oriented function attorney disciplinary proceedings serve, Erdmann v. Stevens, supra, 458 F. 2d at 1210; Anonymous v. Association of the Bar of the City of New York, supra, 515 F. 2d at 432, the federal courts must be extraordinarily reluctant to interject themselves into such proceedings. Therefore, although agreeing that the plaintiffs'

> constitutional claims are without merit, I believe these cases call for the application of the Younger abstention rule and should be dismissed on that ground." 405 F. Supp. at 198-99.

Of course, in the instant case appellant exhausted every possible State remedy and even sought review by petition for a writ of certiorari filed with the Supreme Court of the United States. Therefore, the abstention issue as delineated in Judge Neaher's opinion cannot be applicable to this case.

Turning to the merits of the issue, we believe it would be an act of supererogation on our part to add to the extraordinary 26-page opinion of Judge Weinstein dissenting in the Mildner case. We incorporate his contentions in this case and urge the Court to consider the issue as ripe for decision.

V.

THE LOWER COURT ERRONEOUSLY REFUSED TO PASS UPON ISSUES PROPERLY BEFORE IT.

As pointed out above, the decisional portion of the lower court's opinion dealt exclusively with the issue of the absence of a right to appeal in the State courts. All the other issues were either ignored or dismissed with a simple statement that "This court should not interfere in state disciplinary proceedings," citing Erdmann v. Stevens, supra, and Anonymous v. Association of the Bar of the City of New York, supra.

Of course both Erdmann and Anonymous dealt with the issue of abstention in the context of a pending disbarment proceeding. But there can hardly be any doubt but that after the conclusion of a disbarment proceeding,an attorney has the right to contest the denial of his Constitutional rights in the proceedings leading to the disbarment. Erdmann itself, 458 F. 2d at 1210, cites Johnson v. Avery, 393 U.S. 483 (1968), for the obvious rule that -

> "the power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights,"

and this rule is equally applied in In re Ruffalo, supra, and other cases cited in Erdmann.

Appellant has sought to have some court pass upon clearly defined issues as to the procedures before the Appellate Division. The New York Court of Appeals refused to consider an appeal; the Supreme Court exercised its discretion to deny a petition for a

writ of certiorari; and the District Court, while it may have considered the issues, made no mention of them in its decision.

Conceivably, this Court may wish to remand the case and direct the District Court to pass upon the issues. Absent such a remand, appellant believes the issues are ripe for decision by this Court.

CONCLUSION

The decision of the court below should be reversed or, in the alternative, the case should be remanded for a consideration by the lower court of the Constitutional issues presented.

Respectfully submitted,

MORTON STAVIS

DORIS PETERSON

c/o Center for Constitutional Rights
853 Broadway
New York, New York 10003
(212) 674-3303

Attorneys for Appellant

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DATE 1975	NR.	PROCEEDINGS
		1a
Mar. 11		Filed complaint in Roch.
11		Filed order to show cause why a temproary stay pending determination of the issued restraining & enjoining defts. from enforcing the Judgment of Disbarment dated 1-28-75 should not be granted & pending pltfs. motion of Temporary Stay the defts, are temporarily restrained until t. hearing from enforcing the order of Disbarmentetc. ret. 3-24-75-Burke, DJ F-162
11		JS 5 made
17		Filed deft., Appellate Division of the Supreme Ct. 4th Judicial Dept., motion to dismiss the complaint for lack of jurisdiction over the subject matter. ret. 3-24-75
24		Order to show cause for temporary stay, etc. Motion by deft. Appellate Division, etc. to dismiss complaint. Adj. to 4-14-75.
31		Filed Deft., Monroe Co. Bar Assn. affidavit in opposition to motion for temporary stay.
Apr. 2		Filed Stipulation & Order continuing order to show cause and TRO to 4-14-75-Burke, D
Apr. 14		Order to show cause for temporary stay, etc. Motion by deft. Appellate Division etc. to dismiss adj. to 5-12-75
Apr. 22		Filed Consent and Order continuing s.c. order and TRO to 5-12-76, etc.-Burke, DJ
May 12		Order to show cause for temporary stay. Motion by deft., Appellate Division etc. to dismiss complaint. To be finally submitted 3 wks. from today. Stay continued until decision on motion.
29		Filed Amended Complaint
July 1		Filed Pltfs. affidavit of service of amended complaint.
7		" Defts'., Appellate Division, etc. & individually-named Justices and Chief Clerk, notice of motion to dismiss amended complaint-ret.at Roch. 7-28-75 Submitted.
1976		
May 17		Filed Defts., Appellate Division of Supreme Ct., 4th Judicial Dept. & the individually maned Justices & Chief Clerk notice of motion for an order dissolving & vacating a temporary restraining order etc. ret. 6-14-76
June 28		Motion by Deft., Appellate Division, to vacate TRO. The Ct. will decide the motion within a few days.
July 2		Filed Decision dismissing the action. The pltf. shall have a stay for a period of 30 days from the date of this order to afford him an opportunity to appeal. If he shall appeal, he shall have a stay pending the appeal-Burke, DJ Notice & copies to Morton Stavis, Robert Napier, Michael Tomaino & Louis J. Lefkowitz F-17
2		Filed Judgment on Decision of the Ct.-Clerk Notice & copies to Morton Stavis, Robert Napier, Michael Tomaino & Louis J. Lefkowitz F-17
2		JS 6 made
30		Filed at Roch. Pltf's. Notice of Appeal (copy mailed 8-2-76 to Messrs. Kogan and Tomaino and to Clerk, CCA with copy of docket entries; CCA's Forms C and D mailed to Mr. Stavis)

CLOSED

AFT:ag

2a

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ARTHUR F. TURCO, JR.,

Plaintiff,

-vs-

CIVIL ACTION

No. 75-100

THE MONROE COUNTY BAR ASSOCIATION and THE APPELLATE DIVISION OF THE SUPREME COURT FOURTH JUDICIAL DEPARTMENT,

Defendants

COMPLAINT

I. PARTIES

A. Plaintiff

1. Plaintiff, Arthur F. Turco, Jr., is a citizen of the United States and a resident of the State of New York, City of Rochester.

B. Defendants

2. The defendant, Monroe County Bar Association is, upon information and belief, an unincorporated association of attorneys and maintains its offices for the conduct of its affairs at the Reynolds Arcade, Rochester, New York.

3. The defendant, the Appellate Division of the Supreme Court Fourth Judicial Department, is established pursuant to the laws of the State of New York, and the Supreme Court Justices, are appointed by the Court of Appeals of the State of New York. The Appellate Division has original jurisdiction concerning matters of attorneys' admission to the bar and any disciplinary actions concerning attorneys.

II. JURISDICTION

4. This is an action for injunctive and declaratory relief under Rule 57 of the Federal Rules and Civil Procedure authorized by Title 42 USC Sec. 1981 et. seq. to secure rights, privileges and immunities established by the Fourteenth Amendment to the Constitution of the United States, jurisdiction is also conferred on this Court by Title 28 USC Sections 1331, 1332, 1343(3) (4) providing for original jurisdiction of this Court and suit authorized by Title 42 USC Sections 1983 and 1985 and jurisdiction is further conferred on this Court by Title 28 USC Sections 2201 and 2202.

This is a proper case for a three-Judge District Court pursuant to Title 28 USC Sections 2281 to 2284, in that this action seeks a permanent injunction and declaratory judgment restraining the defendants from further activity as described in the complaint herein.

III. STATEMENT OF FACTS

5. On or about April, 1972 pursuant to an order by presiding Justice Harry Goldman, of the Appellate Division of the Supreme Court, Fourth Judicial Department, Alex Gossin, Esq., a member of the Monroe County Bar Association, Grievance Committee, was ordered to investigate and report to the Appellate Division two misdemeanor convictions concerning the plaintiff herein.

6. Several times thereafter, Alex Gossin spoke with the plaintiff herein concerning two misdemeanor pleas. Plaintiff spoke at length with Mr. Gossin explaining all the surrounding

circumstances of said pleas and also informed Mr. Gossin that he could present evidence concerning his innocence, and that Alex Gossin agreed at a future time and date to meet with the plaintiff herein, and examine said evidence.

7. On May 8, 1973, the Monroe County Bar Association filed a petition charging the plaintiff with two misdemeanor convictions. The petition was filed in the Appellate Division, Supreme Court, Fourth Judicial Department.

8. The petition filed by the Monroe County Bar Association charges the plaintiff with two guilty pleas, both misdemeanors.

9. In September, 1973, the plaintiff moved to dismiss the petition, or in the alternative a full evidentiary hearing on these charges since he had interposed pleas of guilty under the case of North Carolina v. Alfred 40 U.S. 25, in which he was allowed to assert his innocence while taking the pleas.

10. The Appellate Division, on December 17, 1973, rejected the contentions raised and the motion to dismiss, and concluded that by reason of the pleas of guilty, that the plaintiff had violated the canon of professional ethics, and that he was not allowed a full hearing to explain and go behind the pleas of guilty but that they would inform the plaintiff of mitigation hearing on character only.

11. On March 28, 1974 the mitigation hearing was commenced before the Hon. Lyman H. Smith, a Justice of the Supreme Court of the State of New York, and was continued from time to time until May 21, 1974 when it was concluded.

12. During the mitigation hearing, there was no evidence whatsoever produced concerning the guilt of Arthur F. Turco, Jr. to the two misdemeanor pleas.

13. During said mitigation hearing, there was no evidence whatsoever produced concerning anything negative concerning Arthur F. Turco's character.

14. At the conclusion of the mitigation hearing plaintiff's attorney, Herald P. Fahringer, read to the hearing officer, all the evidence that Arthur Turco would produce showing that he was innocent of the two misdemeanor charges, however, Judge Lyman Smith said that he could not accept such evidence pursuant to the Appellate Division order dated December 17, 1973.

15. The Hon. Lyman M. Smith's report was filed on October 25, 1974 with the Appellate Division, Fourth Department, Judge Smith, who was directed by the Appellate Division to report his findings to the Court without recommendations summarized his conclusions by stating:

> "His dedication to and professional representation, (after admission to the bar) of indigent black defendants without financial reward and at considerable risk to his personal reputation (and, inferential to his personal safety) during a volatile period in the 1960s marked by racial confrontation and by student unrest, not only in the United States but throughout the world."

After said mitigation hearing, and Judge Lyman Smith, on October 25, 1974 filed his findings with the Appellate Division, the plaintiff submitted a brief which stated in part that no evidence whatsoever was produced concerning Arthur Turco's guilt,

and the fact that there were forty-eight witnesses testified on his behalf, and over two hundred persons signed petitions of his good character, that there should be no discipline meted out.

16. On January 28, 1975, the Appellate Division, Fourth Judicial Department, rendered its judgment disbaring the plaintiff.

17. The decision, dated January 28, 1975 the Appellate Division, disbaring the plaintiff, for over fourteen pages, is based upon mere allegations, that the plaintiff was precluded by Appellate Division order from refuting, and said allegations, unsupported by any evidence, are totally false.

18. The Appellate Division, by its own order, dated December 17, 1973, did not allow Arthur Turco to go behind the two convictions to prove his innocence, however by its decision, the Appellate Division went far behind that order, and found as fact, mere allegations, which the defendant was not even advised that he was being charged with.

19. On February 3, 1975, the Hon. Sol Wachtler, associate Judge of the Court of Appeals, signed a stay, pending motion to the Court of Appeals for leave to appeal.

20. On February 17, 1975, the plaintiff did submit to the Court of Appeals, a motion for leave to appeal.

21. Pursuant to the laws of the State of New York, an attorney is not allowed an appeal to the Court of Appeals as a matter of right, but must seek permission of said Court to appeal.

22. On February 19, 1975 the Court of Appeals of the State of New York denied plaintiff permission to appeal.

23. On February 24, 1975, the original stay granted by Justice Wachtler, of the Court of Appeals, terminated.

CAUSE OF ACTION

24. The actions of the defendants, as set forth above, have purpose and/or effect of:

(a) Denying to the plaintiff his fundamental rights of due process of law, all in violation of the Fifth, Sixth, Ninth and Fourteenth Amendments of the United States Constitution.

(b) The plaintiff was further denied due process of law because his disbarment was based upon allegations, unsupported by any evidence. In fact, there is evidence of the defendant's innocence, as part of the Court record in the State of Maryland, which the plaintiff offered to introduce, but was precluded by the Appellate Division Order dated December 17, 1973.

(c) The plaintiff was further denied due process because his disbarment is based upon allegations not contained in the Bar Association's petition of charges against him, thus denying the plaintiff the fundamental right of due process of being notified of the charges pending against him.

(d) Plaintiff was further denied the fundamental right of due process of law because he was foreclosed from repudiating the allegations, which were not contained in the Bar Association's petition, that were relied upon by the Appellate Division in its judgment of disbarment.

(e) The plaintiff was further denied due process of law and equal protection of the law because his disbarment was discrimitory and based upon mere suspicion and conjecture and not evidence.

(f) The plaintiff was further denied due process of law because the two pleas entered were based upon the doctrine in North Carolina v. Alfred in which the plaintiff asserted his innocence at the time of taking the pleas, and was thus precluded from raising that same question of innocence during said disciplinary proceeding.

(g) Plaintiff was further denied due process in that the defendant, Monroe County Bar Association, had originally granted the defendant the right to present evidence of his innocence before that party before said charges were filed with the Appellate Division.

(h) The plaintiff was further denied due process in that the Monroe County Bar Association investigation, which originally granted the defendant the right to produce evidence of his innocence, was based solely on allegations unsupported by any evidence, and without consulting the plaintiff. The plaintiff was further denied due process of law, in that the denial of the Court of Appeals to grant leave to appeal, is a violation of the Constitution of the United States. The Appellate Division, in a disciplinary proceeding, acts as a Court of original jurisdiction, and that pursuant to the Rules of the Court of Appeals, does not grant an attorney the right to appeal but must seek permission, all in violation of the due process of law pursuant to the Constitution of the United States.

27. The actions on behalf of the defendant, MONROE COUNTY BAR ASSOCIATION, and the defendant, APPELLATE DIVISION OF THE SUPREME COURT FOURTH JUDICIAL DEPARTMENT, together, have denied the plaintiff his most fundamental rights of due process and equal protection of the law as guaranteed by the Fifth, Sixth, Ninth and Fourteenth Amendments of the Constitution of the United States.

That the APPELLATE DIVISION and the MONROE COUNTY BAR ASSOCIATION, by Court Order, refused to let the plaintiff introduce evidence of his innocence, and go behind the two pleas entered, while, in the Appellate Division, a decision of disbarment dated January 28, 1975, the Appellate Division went far behind said pleas, and found as fact, unsupported allegations, while denying the plaintiff, the opportunity to disprove said allegations by introducing evidence, part of which is contained as a matter of Court record in the State of Maryland.

28. Unless this Court restrains and enjoins the defendants from enforcing their Order of Disbarment, the plaintiff will suffer and continue to suffer serious, immediate and irreparable injury in that:

(a) Said disbarment will have the immediate affect of interferring and impeding efforts of the plaintiff to prepare adequately for the defense of certain defendants now or about to face trial.

(b) Said disbarment against the plaintiff, HUGO, will have an immediate and irreparable affect upon the exercise of fundamental due process rights of the Constitution of the

(c) The said disbarment of the defendant, TURCO, has resulted in serious and irreparable injury to his professional reputation as a lawyer, and has illegally and unconstitutionally punished and penalized him without due process of law, as well as subjecting him to public scorn and ridicule.

(d) The said disbarment of defendant, TURCO, has resulted in unemployment and loss of income, which damage threatens his livelihood and that of his wife and two small children.

29. The plaintiff has no adequate remedy at law.

30. No previous application for the relief sought herein has been made to this or any other Court.

WHEREFORE, plaintiff prays for the following relief:

1. That a permanent injunction be issued:

a) Restraining the defendants and each of them, their agents, employees and attorneys and all others acting in concert with them and their successors, from enforcing the Order of Disbarment dated January 28, 1975, by the Appellate Division of the Supreme Court, Fourth Judicial Department.

b) That a Declaratory Judgment issue declaring that the denial of the right of appeal, by the State of New York, as applied to attorneys when the Appellate Division is sitting as a Court of original jurisdiction, is unconstitutional and a denial of due process of law as defined by the Constitution of the United States. more specifically section 5601 of the Civil Practice Rules and Laws of the State of New York

2. That this Court grant plaintiff such other

and further relief as may seem to it to be appropriate.

Dated: March 10, 1975.

Respectfully submitted,

MORTON STAVIS, ESQ.
Attorney for Plaintiff
744 Broad Street
Newark, New Jersey

CHARLES GARRY, ESQ.
Attorney for Plaintiff
1256 Market Street
San Francisco, California

RAMSEY CLARK, ESQ.
Attorney of Counsel for Plaintiff
37 West 12th Street
New York, New York

LEONARD WEINGLASS, ESQ.
Attorney of Counsel for Plaintiff
2909 1/2 Ocean Front Walk
Venice, California

WILLIAM M. KUNSTLER, ESQ.
Attorney of Counsel for Plaintiff
853 Broadway
New York, New York

MARGARET L. RATNER, ESQ.
Attorney of Counsel for Plaintiff
351 Broadway
New York, New York

Robert Napier
630 Reynolds arcade
Rochester, N.Y.
attorney of counsel for Plaintiff -
all papers mailed to him -

12a

STATE OF NEW YORK, COUNTY OF MONROE) SS:

ARTHUR F. TURCO, JR., being duly sworn, deposes and says that deponent is the plaintiff in the within action; that deponent has read the foregoing Complaint and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters deponent believes it to be true.

Arthur F. Turco, Jr.

Sworn to before me this

day of , 1972.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ARTHUR F. TURCO, JR.,

Plaintiff,

vs.

THE MONROE COUNTY BAR ASSOCIATION and THE APPELLATE DIVISION OF THE SUPREME COURT FOURTH JUDICIAL DEPARTMENT,

Defendants.

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER

UPON the complaint of ARTHUR F. TURCO, JR., and the affidavits and affirmation attached hereto, and upon all the proceedings heretofore had, and sufficient cause being shown, it is

ORDERED, that the defendants above named show cause at the United States District Court, for the Western District of New York, located in the City of Rochester, New York, at 10:00 o'clock in the forenoon on the 24 day of April, 1975, or as soon thereafter as counsel can be heard, why the United States District Court should not issue and enter a ~~preliminary injunction~~ temporary stay, pending the determination of the issues in this action, restraining and enjoining the above named defendants, from enforcing the Judgment of Disbarment dated January 28, 1975; and it is further

ORDERED, that pending the plaintiff's motion for a ~~preliminary injunction~~ temporary stay, that the defendant, THE MONROE COUNTY BAR ASSOCIATION and the APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, and each of them, their agents, successors, deputies, servants and employees and all persons acting by, through or under them or either of them, or by or

through their order, be and they are hereby temporarily restrained until the hearing on March 24, 1975 and determination of the motion thereon to be made from enforcing the Order of Disbarment dated January 28, 1975..

Service of a copy of this Order on behalf of the plaintiff herein, must be made upon the defendants on or before the 14 day of March, 1975, and such service shall be deemed sufficient.

Dated: March 11 1975.

H. Carl D. Burke
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ARTHUR F. TURCO, JR.,

Plaintiff,

-against-

THE MONROE COUNTY BAR ASSOCIATION and THE APPELLATE DIVISION OF THE SUPREME COURT FOURTH JUDICIAL DEPARTMENT,

Defendants.

NOTICE OF MOTION

PLEASE TAKE NOTICE that the defendant, the Monroe County Bar Association, will move this Court at a Motion Term thereof to be held at the United States District Court for the Western District of New York at the Federal Building in the City of Rochester, New York, on May 12, 1975 at the opening of Court on that day or as soon as counsel can be heard thereafter for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure for an order dismissing the complaint herein on the merits on the grounds that the Court lacks subject matter jurisdiction, that the complaint fails to state a claim upon which relief can be granted, that this action is barred by the doctrine of res judicata and the provisions of Article IV, Section 1 of the United States Constitution and on the ground of abstention and granting such other and further relief as the Court may deem just and proper.

Dated: April 24, 1975

Yours, etc.

MICHAEL T. TOMAINO
Attorney for Monroe County Bar Association
Office and P. O. Address
Lincoln First Tower
Rochester, New York 14603

TO: ROBERT C. NAPIER, ESQ.
620 Reynolds Arcade Building
Rochester, New York 14614

WILLIAM J. KOGAN, ESQ.
Assistant Attorney General
The Capitol
Albany, New York 12224

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ARTHUR F. TURCO, JR.,

Plaintiff,

vs.

THE MONROE COUNTY BAR ASSOCIATION and THE APPELLATE DIVISION OF THE SUPREME COURT FOURTH JUDICIAL DEPARTMENT,

Defendants.

AFFIDAVIT IN OPPOSITION TO MOTION FOR TEMPORARY STAY

STATE OF NEW YORK)
COUNTY OF MONROE) SS:
CITY OF ROCHESTER)

MICHAEL T. TOMAINO, being duly sworn, deposes and says:

I am an attorney duly licensed to practice my profession in the State of New York and I am a member of the bar of this Court. I have acted as attorney for the Monroe County Bar Association in connection with the disciplinary proceedings involving Arthur F. Turco, Jr. in the Courts of the State of New York and I am fully familiar with those disciplinary proceedings and with the matters hereinafter set forth. This affidavit is made on behalf of the Monroe County Bar Association in opposition to Mr. Turco's motion in this action for a temporary stay, pending the determination of the issues in this action, of the order of disbarment of the Appellate Division of the Supreme Court, State of New York, Fourth Judicial Department dated January 28, 1975.

Background

The disciplinary proceedings with respect to Mr. Turco were commenced in 1973 by the Bar Association with the service and filing in the Appellate Division Fourth Department of a Notice of Petition and Petition dated May 8, 1973. The Petition and the attachments thereto establish that Mr. Turco entered a plea of guilty in the State of Maryland on February 14, 1972 to common law assault in full satisfaction of multiple indictments stemming from the slaying of Eugene LeRoy Anderson in July, 1969. Mr. Turco thereafter filed an appeal to the Court of Special Appeals of the State of Maryland contending that his prior motions to dismiss the indictments should have been granted. The Appellate Court reviewed Mr. Turco's assertions in detail in a fourteen-page decision dated June 13, 1973 and affirmed the conviction based upon his plea of guilty.

The petition of the Bar Association also shows that on March 8, 1972 Mr. Turco was convicted upon a plea of guilty to a violation of § 265.05 of the Penal Law of the State of New York in full satisfaction of charges of illegal possession of dangerous weapons, possession of dangerous drugs, possession of hypodermic instruments and obstructing governmental administration. Such guilty plea was entered by Mr. Turco after the Court had denied his motion to suppress certain evidence. Mr. Turco's appeal from the conviction based upon his plea of guilty

was affirmed on December 19, 1972.

By order dated September 11, 1973 the Appellate Division denied Mr. Turco's motion for an order to transfer the disciplinary proceedings to the Appellate Division, First Department.

By order dated December 17, 1973 the Appellate Division found Mr. Turco guilty of professional misconduct and ordered that, if Mr. Turco so desired, a hearing in mitigation of the discipline to be adjudged would be accorded to him.

By order dated January 17, 1974, the Appellate Division noted Mr. Turco's request for a hearing in mitigation and appointed Justice Lyman H. Smith to take such proof in mitigation as Mr. Turco may offer and to report to the Appellate Division without recommendation.

The Notice of Petition and Petition, and the Exhibits thereto, are incorporated herein by reference as Exhibit "A" and will be handed up to the Court upon the argument of this motion. The September 11, 1973, December 17, 1973, and January 17, 1974 orders of the Appellate Division are attached hereto as Exhibits "B", "C" and "D", respectively. The decision of the Court of Special Appeals of Maryland dated June 13, 1973 is attached hereto as Exhibit "E".

The Mitigation Hearings

Hearings in mitigation were conducted before Justice

Smith on March 28 and 29, April 4 and 5, and May 2, 3 and 21, 1974. Over eight hundred pages of testimony were taken. Justice Smith submitted a report to the Appellate Division dated October 25, 1974 without recommendation. Mr. Turco presented, in addition to evidence with respect to his character and ability as an attorney, testimony as to his asserted innocence of the charges which were the basis for his convictions in Maryland and New York City.

The Order and Opinion of Disbarment

After receiving Mr. Turco's extensive brief and conducting oral argument in Chambers, the Appellate Division Fourth Department issued an opinion dated January 28, 1975 finding that Mr. Turco should be disbarred. An order was entered accordingly and thereafter personally served upon Mr. Turco. The opinion and order are attached hereto as Exhibits "F" and "G", respectively. The opinion of the Appellate Division sets forth in detail the factual basis for Mr. Turco's disbarment and the facts will not further be repeated herein.

Mr. Turco's Appeal to the New York Court of Appeals

Mr. Turco served and filed an amended notice of appeal dated February 3, 1975 and also moved for permission to appeal to the New York Court of Appeals. By order dated February 19, 1975 the Court of Appeals denied Mr. Turco's motion

for leave to appeal, denied his motion for a stay pending appeal and, upon the Court's own motion, dismissed the appeal taken as of right. The order of the Court of Appeals is attached hereto as Exhibit "H".

Mr. Turco's Petition for a Stay
in the New York Court of Appeals

Thereafter, the Bar Association was served with Mr. Turco's "Petition for a Stay" dated March 6, 1975 in the New York Court of Appeals. Such petition is attached hereto as Exhibit "I". Such petition requests that a stay be granted pending the filing and ruling on the Petition for Certiorari to the Supreme Court of the United States or pending the application for a stay to a Justice of the Supreme Court of the United States. To date, we have not been advised that the Court of Appeals has ruled on Mr. Turco's petition for a stay and we have not been served with any Petition for Certiorari to the Supreme Court of the United States or with any application for a stay from a Justice of the Supreme Court of the United States.

By reason of the foregoing, it is respectfully submitted on behalf of the Bar Association that the plaintiff's motion herein for temporary injunctive relief be denied in all respects.

Michael T. Tomaino

Michael T. Tomaino

Sworn to before me this
18th day of March, 1975.

Hubert F. Ferrell

HUBERT F. FERRELL
Notary Public, State of New York
Qualified in Monroe County
My Commission Expires March 30, 1976

State of New[redacted]rk Supreme Court
Appellate D[redacted]ision - Fourth Judicial [redacted]tment

22a

In the Matter of ARTHUR F. TURCO, JR.,
an Attorney,

Respondent,

MONROE COUNTY BAR ASSOCIATION,

Petitioner.

Ex. 4

PETITION

To the Presiding Justice and
Associate Justices of the Appellate
Division of the Supreme Court,
Fourth Judicial Department:

The Monroe County Bar Association respectfully shows the Court as follows, upon information and belief:

1. Petitioner is a duly constituted Bar Association, incorporated, organized and existing under the Laws of the State of New York and maintains its office at 8 Reynolds Arcade, Rochester, New York 14614.

2. Respondent is an attorney and counselor at law duly admitted to practice by the Appellate Division of the Supreme Court, First Judicial Department on December 21, 1967.

3. Respondent resides at 199 Plymouth Avenue South, Rochester, New York and maintains his professional office at 521 Powers Building, Rochester, New York 14614.

4. By order dated April 2, 1972 this Court directed, among other things, that petitioner conduct a preliminary investigation of the professional conduct of petitioner and that charges be prepared, served and filed if, upon the conclusion of such investigation, petitioner finds sufficient evidence of professional misconduct to warrant the institution of a

disciplinar proceeding. A copy of su order is attached hereto as Exhibit "A". 23a

5. On or about May 1, 1970, respondent, together with certain other individuals, was indicted in Baltimore, Maryland, in connection with the slaying of one Eugene Leroy Anderson on July 12, 1969. Specifically, respondent was charged with conspiracy to commit murder (indictment 2313), assault with intent to murder (indictment 2314, first count), common law assault (indictment 2314, second count), soliciting to commit a felony [murder] (indictment 2315), and soliciting to commit a felony [kidnapping] (indictment 2316). The aforesaid indictments are attached hereto as Exhibits "B", "C", "D", and "E" respectively.

6. On February 14, 1972 respondent entered a plea of guilty to the second count of indictment 2314, common law assault, in satisfaction of all pending charges. The transcript of proceedings on February 14, 1972 in the Criminal Court of Baltimore is attached hereto as Exhibit "F".

7. Respondent was sentenced to a term of five years in the custody of the Department of Correction but such sentence was suspended (Exhibit "F", p. 47).

8. Respondent filed an appeal to the Court of Special Appeals of Maryland in proper person. The Appeal was argued orally on March 2, 1973. No decision has yet been rendered.

9. Attached hereto as Exhibit "G" is a certified copy of the docket entries in connection with indictment 2314 and a certified copy of said indictment.

10. On February 22, 1970 respondent was arrested in New York City and charged with possession of dangerous weapons, possession of dangerous drugs, possession of hypo instrument

and obstructing Government administration. A report of such arrest by the New York City Police Department is attached hereto as Exhibit "H".

11. On March 8, 1972 respondent entered a plea of guilty to a violation of section 265.05 of the Penal Law (no specified subdivision) as a misdemeanor and on April 3, 1972 was conditionally discharged. The transcript of record of the Criminal Court of the City of New York is attached hereto as Exhibit "I".

12. A certified copy of the court record in the Criminal Court of the City of New York and the affidavit in support of the charges against respondent are attached hereto as Exhibit "J". The Decision of Justice Jack Rosenberg denying a motion to supress certain evidence and certain admissions is attached hereto as Exhibit "K". The stenographic minutes of proceedings on March 8, 1972 when respondent entered a plea of guilty of unlawful possession of a weapon in violation of section 265.05 is attached as Exhibit "L".

13. Respondent appealed his conviction to the Appellate Term, First Department, which unanimously affirmed said conviction without opinion on December 19, 1972.

14. By reason of the foregoing, petitioner submits that respondent is or may be guilty of professional misconduct, crime, misdemeanor or felony.

WHEREFORE, petitioner prays that the Court make such order with respect to respondent's license to practice as an attorney and counsellor-at-law as it deems proper and to take

such other and further proceedings as to the Court may seem just and proper.

Dated: May 8, 1973

Monroe County Bar Association

By S/Anthony R. Palermo
President
8 Reynolds Arcade
Rochester, New York 14614

26a

STATE OF NEW YORK)
SS:
COUNTY OF MONROE)

ANTHONY R. PALERMO, being duly sworn, deposes and says That he is an officer, to wit, president of the Monroe County Bar Association, that he has read the foregoing Petition and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true based upon his review of the exhibits attached thereto and his discussion with members of the Complaints and Grievances Committee of the Monroe County Bar Association, who conducted the investigation of the matter.

S/Anthony R. Palermo

Sworn to before me this
8th day of May, 1973.

MICHAEL T. TOMAINO
Notary Public, State of N.Y., Monroe County
My Commission Expires March 30, 1974

27a
Ex. B

APPELLATE DIVISION
OF THE
Supreme Court
STATE OF NEW YORK
FOURTH JUDICIAL DEPARTMENT

PRESENT: GOLDMAN, P.J., DEL VECCHIO, MARSH, WITMER, MOULE, JJ.

In the Matter of ARTHUR F. TURCO, JR., an Attorney,
Respondent,

MONROE COUNTY BAR ASSOCIATION, Petitioner.

The respondent, Arthur F. Turco, Jr., having duly moved before this Court for a transfer of the proceedings against the respondent to the Appellate Division of the Supreme Court, First Judicial Department, upon the grounds that respondent was admitted to practice by the Appellate Division, First Department, and has practiced in that area for most of his professional career, for other stated grounds, and because the interests of justice would best be served by such a transfer.

Now, upon reading and filing the affidavit of Herald Price Fahringer, sworn to June 20, 1973, the notice of motion together with proof of service thereof upon the petitioner, and after hearing Mr. Herald Price Fahringer, attorney for the respondent, and Messrs. Michael T. Tomaino, Bruce E. Hansen, and Anthony R. Palermo, of counsel for the petitioner, and due deliberation having been had thereon,

It is hereby ORDERED, That the motion to transfer the proceedings to the Appellate Division, First Judicial Department, be and the same hereby is denied in all respects.

Enter.

LESTER A. FANNING

Entered: September 11, 1973

LESTER A. FANNING, *Clerk.*

EXHIBIT "B"

28a

EX. C

APPELLATE DIVISION
OF THE
Supreme Court
STATE OF NEW YORK
FOURTH JUDICIAL DEPARTMENT

PRESENT: DEL VECCHIO, J.P., MARSH, MOULE, CARDAMONE, SIMONS, JJ.

In the Matter of ARTHUR F. TURCO, Jr., an Attorney, Respondent,

Monroe County Bar Association, Petitioner.

Upon reading and filing the petition of the Monroe County Bar Association, verified the 8th day of May, 1973 by Anthony R. Palermo, President, alleging that respondent is or may be guilty of professional misconduct in his office as an attorney and counselor at law, together with the exhibits annexed thereto, the answer of Arthur F. Turco, Jr., filed the 21st day of June, 1973, in which he requests that the charges be dismissed, or, in the alternative, for other relief, together with the appendix annexed thereto, and after hearing Mr. Bruce E. Hansen and Mr. Michael F. Tomaino, of counsel for petitioner, and Mr. Herald P. Fahringer, of counsel for respondent, and due deliberation having been had thereon,

This Court hereby finds that respondent is guilty of professional misconduct in his office as an attorney and counselor at law, and

It is hereby ORDERED, That if respondent desires a hearing in mitigation of the discipline to be adjudged, he may so advise the court within twenty days from the date of the entry of this order, and such a hearing will be accorded to him.

Memorandum: In Maryland respondent was indicted and tried for conspiracy to commit murder, assault with intent to murder and other crimes. After the jury disagreed and a new trial was ordered, respondent plead guilty to common law assault. Thereafter, respondent was arrested and charged in the Criminal Court of the City of New York with possession of dangerous

weapons and ammunition therefor, possession of dangerous drugs and other crimes. He plead guilty to possession of a dangerous weapon in violation of section 265.05 of the Penal Law in full satisfaction of these charges and an additional charge of jumping bail and fleeing the jurisdiction. By reason of the above two convictions of respondent the Monroe County Bar Association has petitioned this court under section 90 of the Judiciary Law for disciplinary action against him. In his answer respondent admits the convictions but seeks to prove that in fact he was not guilty of the charges to which he plead guilty; and he asserts that the petition is insufficient in law and he moves for its dismissal. We conclude that the petition is sufficient and that the motion should be denied. We also conclude that North Carolina v. Alford (400 U.S. 25), on which respondent relies, does not support his contention that he has the right now to prove that he was not guilty of the charges as he plead. In Alford, supra, the court merely held that it is proper for a court to accept a defendant's plea of guilty to a lesser crime in compromise of an indictment, provided the plea is voluntarily made (see, in accord, People v. Clairborne, 29 N Y 2d 950; People v. Foster, 19 N Y 2d 150; People v. Griffin, 7 N Y 2d 511). No claim is made here that respondent's pleas were not voluntary.

Although respondent suggests that his pleas were reluctantly made and were similar to pleas nolo contendere and hence of no effect in another proceeding (see Matter of Kimball, 33 N Y 2d 586), the plea of nolo contendere has been abolished in New York (Ando v. Woodberry, 8 N Y 2d 165, 170), and the records of respondent's pleas show conclusively that they were nothing less than pleas of guilty to reduced charges. In the absence of a contention that respondent has evidence "which was unavailable to him" at the time of those pleas (see Matter of Keogh, 17 N Y 2d 479, 481) we deem the two convictions to be final and binding upon him.

These acts of which respondent stands convicted constitute professional misconduct on his part in violation of Canons of Professional Ethics, Nos. 29 and 32, and of the Code of Professional Responsibility, Disciplinary Rules, No. 1-102 (A) (3) (5) and (6), namely, that a lawyer should strive at all times to uphold the honor and maintain the integrity of the profession. [illegible]l find his highest honor as an honest man; and that he will engage in no illegal conduct involving moral turpitude or that is prejudicial to the administration of justice or that adversely reflects on his fitness to practice law. For such misconduct respondent should be disciplined.

If respondent desires a hearing in mitigation of the discipline to be adjudged, he may so advise the court within 20 days of the entry of the order hereon, and such a hearing will be accorded to him.

It is hereby further ORDERED, That pursuant to Judiciary Law, § 90, this order, being intermediate, is confidential and not published.

Enter.

LESTER A. FANNING

Entered: December 17, 1973

LESTER A. FANNING, Clerk

31a

Ex. D

APPELLATE DIVISION
OF THE
Supreme Court
STATE OF NEW YORK
FOURTH JUDICIAL DEPARTMENT

PRESENT: MARSH, P.J., MOULE, CARDAMONE, SIMONS, DEL VECCHIO, JJ.

In the Matter of ARTHUR F. TURCO, JR., an attorney, Respondent,

Monroe County Bar Association, Petitioner

This Court by Order entered December 17, 1973, having found that respondent is guilty of professional misconduct in his office as an attorney and counselor at law and pursuant to said Order respondent by his attorney Herald Price Fahringer having under date of December 29, 1973 requested a hearing in mitigation of the discipline to be adjudged, and due deliberation having been had thereon,

It is hereby ORDERED, That Honorable Lyman H. Smith, Justice of the Supreme Court, is hereby appointed to take such proof in mitigation as respondent may offer and report the same to this Court, without making recommendations thereon, with all convenient speed. The Justice shall fix the time and place for the hearing.

It is hereby further ORDERED, That pursuant to Judiciary Law, § 90, this Order, being intermediate, is confidential and not published.

Enter.

LESTER A. FANNING

Entered: January 17, 1974

LESTER A. FANNING, *Clerk.*

EXHIBIT "D"

UNREPORTED

32a

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Ex. E

Turco Ct. Cir.

No. 121

September Term, 1972

ARTHUR F. TURCO

v.

STATE OF MARYLAND

Morton
Thompson
Powers,

JJ.

PER CURIAM

Filed: June 13, 1973

Petitioner's Exhibit "C"

EXHIBIT "E"

Arthur F. Turco, appellant, entered a plea of guilty to a charge of assault and battery in the Criminal Court of Baltimore, Judge J. Harold Grady, presiding. A sentence of five years was imposed and suspended during good behavior for five years. Turco, a member of the New York bar, appeals from the conviction without raising the question of voluntariness of the guilty plea and in his reply brief specifically disclaims an intention to raise that question; rather he contends that the indictments on this and other related charges should have been dismissed by the trial judge upon motions made prior to entry of the guilty plea.

Relying on Ogle v. Warden, 236 Md. 425, 204 A.2d 179 and Fix v. State, 5 Md. App. 703, 705, 249 A.2d 224, the State contends the entry of the guilty plea completed a waiver of any right to contest the validity of the indictment especially as the record shows the plea was entered with a full understanding of the alleged defects in the indictment by one who was trained in the law and active as a lawyer in the defense of criminal cases. Since the oral argument, the State's position has received support from the Supreme Court of the United States in the case of Davis v. United States, ___ U.S. ___, 93 S.Ct. 1577, ___L.Ed.2d ___ (1973). We prefer to dispose of Turco's contentions on a factual basis and therefore we will assume without deciding that the guilty plea did not waive the alleged defects in the indictment.

It was agreed by stipulation that if the case were tried, the State would produce witnesses to testify as follows: A body identified as that of Eugene Leroy Anderson was found in Leakin Park on October 27,

1969, and that the medical examiner would testify that the cause of death was a shotgun wound in the chest. Mary Anderson, wife of the deceased, would testify that she last saw her husband some time prior to July 9, 1969.

Donald Vaughn would testify that on July 9, 1969, he, the witness, Arthur Turco, the appellant, Eugene Anderson, the deceased, together with Henry Mitchell and others were distributing Black Panther literature in the 1700 block of Pennsylvania Avenue. He would further testify that on the following day, July 10, 1969, Eugene Leroy Anderson came to the Black Panther headquarters and offered to assist in the painting of the headquarters then in progress. After the deceased had talked with some of the members he was carried bodily upstairs followed by Arthur Turco, the appellant, and others. In about ten minutes Turco came downstairs saying they were going to interrogate the deceased. Mr. Vaughn would further testify they put the deceased on a file box and two of the members, Mahonney Kebe and another, began striking him. The witness left the room and went into the kitchen where he heard Turco talking with Henry Mitchell, saying, "We can't keep him here ... We have to off him", which the witness understood to mean they would have to kill Anderson. At this time one of the members was boiling water to which sugar was added. The witness was directed to get a hunting dagger, which he did and returned to the front room. Some of those present dipped the dagger into the syrup and placed it upon the upper face under Anderson's eye and rolled it down the face removing the first layer of skin and the same thing was done to his chest. Some of the persons present again hit the deceased. Henry

Mitchell grabbed the deceased by the head and pointed a revolver at him stating he was going to kill him. Mitchell then left. Another person present took a lighted cigarette and burned Anderson under the eye. All of these occurrences took place in the presence of Turco who at one time picked up Anderson and threw him to the floor whereupon another individual kicked him in the groin; that those present, including Turco, carried the deceased upstairs where a beating with bed slats continued through the night. The appellant, Turco, left the room with Henry Mitchell in the early morning hours. At about 8 o'clock in the morning Vaughn saw Arnold Loney coming into the headquarters. Vaughn remained as guard over Anderson throughout the day of July 11, 1969 at the Black Panther headquarters. When Vaughn left the headquarters at about 8 o'clock that night, the victim was tied up in a closet on the second floor and Turco was out in front of the headquarters on the way to get Mitchell out of jail.

Sam Walters, an undercover police agent operating within the Black Panther Party, would testify that on the evening of July 10th, he attended a political education class at the headquarters. When he left the building about 11 p.m. he offered Turco a ride home. The offer was declined and Turco and Mitchell remained at the headquarters when the witness left.

Arnold Loney would testify that at 8 a.m. on July 11, 1969, he went to the Black Panther headquarters where one, Larry Wallace, the headquarters duty officer, informed him that they had "caught a pig." Loney was summoned to a meeting on the third floor. Among those whom

he would name as being present were Arthur Turco, Henry Mitchell, Charles Wyche and others. That Henry Mitchell inquired of him what he knew about a petition concerning the reinstatement of a Captain Hart of the Black Panther Party who had been demoted five days earlier. Loney and Wyche were told that in retribution for circulating the petition Mitchell wanted them "to take care of the pig." Loney would testify that Turco was present during the entire meeting encouraging Mr. Mitchell in all that he said, cursing at Loney and Wyche, and that Turco told them to go ahead and do what they had to do with Anderson. Loney and Wyche left the headquarters to select a location at which to perform the murder. At 6:30 that evening Loney returned to the headquarters and attended a political education class conducted by Turco. Turco was called out of the room and another individual assumed direction of the class. About 9:30, Loney went downstairs and met Wyche and Turco, whereupon Turco said, "Go and do what you have to do." Loney and Wyche left and secured at least one shotgun and a vehicle and returned to Panther Headquarters for the purpose of transporting the victim.

Irving Young drove the car, Melvin Johnson sat in the front seat and in the back seat between Charles Wyche and Loney sat the victim. Upon their arrival, the preselected site where they intended to commit the murder was too crowded. They left the area and drove around quite awhile. They entered and then left the Eastern Shore via the Bay Bridge. Upon their return to the Glen Burnie area, their automobile was stopped by State Trooper Khranika, who would testify that he stopped the car because he believed its occupants to have been involved

in a robbery. The trooper ascertained that the occupants were not those wanted and gave the driver, Mr. Young, a warning ticket to have a light fixed on the car. Trooper Khranika observed the victim sitting in the back seat. He was assured by the other persons in the car the man had been beaten in a fight in Annapolis and they were taking him to Baltimore for hospital treatment.

Loney if called would further testify that at approximately 1:30 a.m. Saturday, July 12, they arrived in Leakin Park in Baltimore City. Loney remained in the car as a lookout as Irving Young, Melvin Johnson, Charles Wyche and the victim went into the woods. Soon thereafter he heard a shotgun blast. The others returned to the car without the deceased. He would testify that Mr. Wyche claimed he had shot the victim.

Barbara Zentz, identified in the hearing on the motions to dismiss the indictment as a court reporter, would testify that she was socially acquainted with Turco and had expected him to visit her home on Friday evening, July 11th. While waiting she fell asleep and was awakened about 1:30 or 2:00 a.m. Saturday morning, July 12th, by Turco's arrival. She would testify that Turco was extremely agitated; he was waving a revolver stating that if the authorities came to get him he would take some of them with him. Mrs. Zentz would further testify that Turco requested that she hide him but she refused.

Other evidence would show that the appellant fled to Canada where he was arrested by Canadian authorities on October 16, 1970, under the birth certificate supported alias of Leon Wright. Turco remained in Canada until extradition proceedings were ordered at which point appellant voluntarily returned to Baltimore City.

Petitioner's Exhibit "C"

Prior to the entry of his guilty plea, Turco filed written motions to dismiss the indictment. Insofar as we can relate the questions raised in the brief to those presented to the trial judge, it appears that the motions based on the following grounds in the trial court are in question before us on appeal. The grounds were presented to the trial judge as follows:

> "Defendant abovenamed herewith moves to dismiss the indictment herein on the ground that, by virtue of the fact that a previous jury was unable to agree on a verdict, there exists as a matter of law a reasonable doubt as to the guilt of said defendant."
>
> "The prosecution has voluntarily abandoned indictments against seven defendants similarly situated to this defendant on the ground that the only evidence is the uncorroborated testimony of accomplices; in pressing this indictment the State is engaging in arbitrary selective and bad faith enforcement of the law, in violation of constitutional provisions of equal protection of law and due process of law.
>
> "The indictments herein are based on the false and perjured testimony of three witnesses before a Grand Jury of Baltimore City. These witnesses conspired and agreed to serve as false witnesses before the Grand Jury."

Turco alleges the indictment should be dismissed because, as one previous jury was unable to agree on a verdict there must exist as a matter of law reasonable doubt as to guilt. He cites a number of cases pertaining to double jeopardy. Among them are United States v. Perez, 22 U.S. 579, 6 L.Ed. 165; Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199; Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707; North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656; Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469; Gori v. United States, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901; and Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100. In all of those cases the rule was recognized that the

mere fact that one jury failed to agree upon a verdict does not preclude a retrial on the same charge. To support his argument more specifically he cites Preston v. Blackledge, 332 F. Supp. 681 (E.D.N.C. 1971), where the Court held that the petitioner could not be retried a fifth time where the juries in four previous trials were unable to reach a verdict; Carsey v. United States, 392 F.2d 810 (D.C. Cir. 1967), where the Court precluded further prosecution after three mistrials and United States v. Castellanos,[1] 349 F. Supp. 720 (E.D.N.Y. 1972), in which the Court dismissed an indictment where two mistrials had occurred. Appellant cites no case, and we are aware of none, where an indictment has been dismissed merely because one trial was aborted by reason of the fact that a jury was unable to agree upon a verdict. We see no reason why the long-standing rule permitting retrials after a jury has failed to agree upon a verdict does not apply to the instant case. It will be noted that in each of the cases relied upon by the appellant the circumstances were most unusual.

To support his argument that the prosecution of the instant case was in bad faith, Turco cites federal cases - progeny of Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965), - which recognize that federal relief may be appropriate where state criminal prosecutions are designed to stifle free expression. To qualify his case for relief based upon this principle, Turco does two things. First, he calls attention to the testimony of three witnesses, Kebe,

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[1] Appellant attached a xeroxed copy of this opinion to his brief. The State moves that it be stricken from the record. Since we see no reasonable basis for the motion, we deny it.

Walters and Vaughn saying it showed that "not only are we dealing with allegations of prosecutorial bad faith but appellant has presented record examples of its obvious presence." We shall analyze this testimony below but we find the record does not support appellant's conclusion. Second, he attached to his brief a purported interview with the State's Attorney for Baltimore City reported in the May 25, 1971 edition of the Afro-American newspaper. The State's Attorney is quoted as saying that a number of indictments arising out of the Leakin Park murder were not supported by the evidence. Indicating that those cases would be dismissed, he is reported as having said, "Only in four of the cases do we have a clearly sustainable charge. One or two other cases barely get over the threshhold of legal sufficiency and should be tried, although chances of successful prosecution are minimal." During oral argument counsel pointed to the interview as supporting his contention that appellant's prosecution was being pursued in bad faith. We do not see it that way. It is more reasonable to assume that the instant case was one of those four the State's Attorney felt clearly sustainable and one of those he intended to prosecute.[2]

To support his contention that the State knowingly used perjured testimony to procure the indictment in the instant case and thus

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[2] The State made a motion to strike the newspaper clipping from the brief. In Turco's reply brief he alleges that the newspaper clipping was attached to his original motion in the trial court to dismiss the indictment. The clipping was not attached to the motion in the record transmitted to this Court. Inasmuch as the record was not properly corrected pursuant to Md. Rule 1034, we grant the State's motion.

denied Turco due process of law, appellant cites Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690; Gray v. Warden, 214 Md. 642, 136 A.2d 246; Jones v. Warden, 214 Md. 656, 136 A.2d 377; Pride v. Warden, 215 Md. 601, 137 A.2d 175; Davis v. Warden, 217 Md. 662, 143 A.2d 77; Myers v. Warden, 218 Md. 633, 145 A.2d 228; Bell v. Warden, 218 Md. 666, 146 A.2d 56; Madison v. State, 205 Md. 425, 109 A.2d 96. It will be noted that in these and in all other cases of which we are aware, there must be a showing that the State knowingly used perjured testimony for there to be a denial of due process of law. The mere fact that perjured testimony was given does not of itself constitute a denial of due process. See Madison v. State, 205 Md. 425, 434, 109 A.2d 96.

Turco alleges three instances show both that the witnesses involved committed perjury and that the State was aware of it. He read into the record exerpts from the testimony of the witnesses taken at Turco's first trial, at the trials of other persons accused and from the Grand Jury minutes. It appears that the witness, Mahonney Kebe, testified that late the night of July 11, 1969, Henry Mitchell issued orders that the victim be killed because he was a police informer. When Kebe was recalled to the witness stand at Turco's first trial he was confronted with a record showing that Henry Mitchell had been arrested and was in jail from about 6 o'clock July 11 until noon the next day when Kebe himself posted Mitchell's bail. The defense made a motion that all of Kebe's testimony be stricken After a conference in chambers the motion was joined by the prosecutor and was granted by the court. According to the record, before the

conference, when Mr. Kebe was presented with this document, he stated, "I want to change my testimony. I saw Mitchell there much earlier in the daytime." We note that the testimony as altered by the witness would agree timewise with the proposed testimony of Arnold Loney that early in the morning of July 11, Henry Mitchell issued orders the victim be killed. More importantly, it is inherently incredible that a prosecutor bent on conviction would have willfully permitted a witness to testify that an important part of the crime occurred at a time when he knew the accused was in jail. Thus, even if we assume the testimony of the witness, Kebe, was perjured it would at worst indicate prosecutorial negligence which by its severe contradictory effect on a crucial part of the State's case would effectively dissipate a charge of a knowing use of perjured testimony. Thus, the appellant's argument with reference to this incident is unsound.

The next incident concerns the testimony of a second witness, Sam Walters. We quote from the appellant's brief:

> "Mr. Walters, the white undercover agent, who had not been produced at the two previous trials or before the grand jury, testified that he had attended a meeting at the Chapter headquarters on July 9, 1969. At that time, he had, according to his testimony, been extensively questioned by appellant as to a petition he had been circulating on behalf of Warren Hart, a former Chapter captain who had been expelled therefrom. As Walters put it, appellant had been the only one to interrogate him even though Henry Mitchell, the acting captain was present.
>
> 'Q. Did Henry Mitchell take part in the discussion at all?
>
> A. No.
>
> Q. He just sat silently by?
>
> A. Occasionally making a remark.

Q. You didn't think Henry Mitchell was the one in command?

A. Not at all.

Q. Arthur Turco in command?

A. That was my assumption.

Q. Did you report the gist of your meeting to Sergeant Burrett?

A. I did.'

"The purpose of such a line of inquiry was, of course, to prove that appellant was the one who, according to Kebe, had ordered the execution of Anderson.

"After Walters had testified on direct, counsel for appellant was furnished the officer's reports for July 7th, 8th, 10th and 11th, but not for July 9th, the date of this alleged occurrence. When they pointed out that it was strange that the report for the latter date was missing, the trial judge ordered the prosecution to make an effort to obtain it. It was finally produced after Walters' testimony had been completed, and appellant was permitted to recall him for further cross-examination.

"During this further cross, he admitted that his superiors had withheld the report of July 9th from him, and that his previous testimony that he had made only an oral report that day was 'untrue.' He further conceded that the remarks he had attributed to appellant in his direct testimony, supra, were attributed in his report to Henry Mitchell.

'Q. You also put into Arthur Turco's mouth, did you not, statements and questions that had been asked by Henry Mitchell? Isn't that true?

A. He asked me those questions.

Q. Who did, Turco?

A. Yes.

Q. You didn't say so in your report, did you?

A. No, I did not.

Q. You only put them in Henry Mitchell's mouth. Correct?

A. Yes.'"

Turco argue that from this record, the trial judge should have inferred that Walter's testimony was false because it differed from his report to the police and that the failure of the State to promptly supply the police report for July 9 indicated bad faith. The hearing judge found that the questions presented were matters pertaining to weight of the evidence and as such were to be presented to the jury. We agree. The fact that the witness's written report was made shortly after the incidents reported therein is, of course, indicative that the report might be accurate. The witness, however, asserted, despite the contradiction with the report, his testimony attributing certain statements to Turco was accurate and that both Mitchell and Turco asked similar questions. The proof of perjury requires more evidence than this. In exercising our duty to find facts with reference to constitutional questions, we find the appellant has not met his burden of establishing that Walters' testimony was perjured.

The last incident refers to the testimony of a third witness, Donald Vaughn. Here again we quote appellant's brief but append thereafter some portions of the record not appearing in the brief.

> "Like Kebe and Loney, Vaughn was alleged to have given a statement to the police in January of 1970. He testified on direct that he had initialled every page and signed the statement after reading it.
>
> 'Q. Did you read the statement after you signed it?
>
> A. I read a copy after he finished.
>
> Q. Did you read the entire statement before you signed?
>
> A. Read each page.

Q. Each word you read?

A. Right.'

"When he was shown the statement by the the Assistant State's Attorney examining him and asked whether it refreshed his recollection as to a particular fact, he answered that it did.

'The Court: Well, have you refreshed your recollection by referring to the statement of January 20, 1970?

The witness: Yes.

The court: Ask him the question then, Mrs. O'Connor.

Mrs. O'Connor: Q. Do you recall, Mr. Vaughn, whether or not Mr. McKutchen was there?

A. Yes, he was there.'

"When appellant later discovered from his school records that Vaughn was illiterate, the latter was, with the trial court's permission, recalled to the stand. He then admitted that he had not read his statement after it had been typed but that his grandmother had read it to him.

'Q. Isn't it a fact, Mr. Vaughn, you cannot read?

A. No, not that good.'"

The following, taken from the guilty plea proceeding, was a reading into the record from appellant's first trial:

"Question: You cannot read it, can you?", top of 377, 'isn't that true?" Answer: I don't feel good." "Question: Mr. Vaughn, isn't your answer you cannot read the answers in the statement because you cannot read?" "Answer: I can read a little bit." "Question: Can you read these answers to the jury? Can you read a single answer in this to the jury? You can pick out any one you want." "Answer: No." "Question: Mr. Vaughn, do you know that in this statement, on the last page, you are asked the question, at least it says so here,: !Donald, after reading this statement consisting of nine pages and finding it containing exactly as you have related to us, will you sign it?' 'Answer: Yes.' Remember that?" "Answer: Yes." "Question; Is it true you never read your statement?" "Answer: It was read to me."

Appellant argues that when the witness said he had read the statement

he patently committed perjury and that this was known to the State. The hearing judge again found the matter to be one of weight of the testimony and we agree. It seems apparent to us that what the witness meant was that he did not read well, that others had read the statement to him and that he could not then read the statement to the jury because he did not feel well. This interpretation is strongly supported when one considers that this witness, of modest intellectual faculties, had been subjected to a long and vigorous cross-examination.

Inasmuch as appellant has failed to make a showing that the State knowingly used perjured testimony, this contention must also fail.

JUDGMENT AFFIRMED.
APPELLANT TO PAY COSTS.

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Ex. F

46 A.D.2d 490

In the Matter of Arthur F. TURCO, Jr., an Attorney, Respondent, v. MONROE COUNTY BAR ASSOCIATION, Petitioner.

Supreme Court, Appellate Division, Fourth Department.

Jan. 28, 1975.

The Supreme Court, Appellate Division, held that conduct which results in indictments for conspiracy to murder, assault with intent to murder, common-law assault, possession of dangerous weapons and drugs, possession of hypodermic needles, and bail jumping and, in convictions on bargained-for guilty pleas to common-law assault and unlawful possession of a weapon warrants disbarment.

Order of disbarment entered.

Attorney and Client ⇨39

Conduct which results in indictments for conspiracy to murder, assault with intent to murder, common-law assault, possession of dangerous weapons and drugs, possession of hypodermic needles, and bail jumping, and in convictions on bargained-for guilty pleas to common-law assault and unlawful possession of a weapon constitutes professional misconduct and warrants disbarment. Canons of Professional Ethics, Canons 29, 32, Judiciary Law Appendix; Code of Professional Responsibility, Canon 1 (DR 1-102(A)(3, 5, 6)), Judiciary Law Appendix; Penal Law 1965, §§ 205.40, 265.05.

Michael T. Tomaino, Nixon, Hargrave, Devans & Doyle, Bruce E. Hansen, Wiser, Shaw, Freeman, Van Graafeiland, Harter & Secrest, Rochester, for petitioner.

Herald Price Fahringer, Buffalo, for respondent.

Before MARSH, P. J., and MOULE, SIMONS, MAHONEY and DEL VECCHIO, JJ.

OPINION

PER CURIAM:

Respondent was admitted to the New York Bar on December 21, 1967 in the First Department. He practiced law in the metropolitan area and environs for several years, and in August, 1971 he moved to Rochester, employed as attorney for the new Bail Fund established in Rochester. After six months that employment terminated and he entered private practice in Rochester and vicinity.

In February, 1972 in Baltimore, Maryland he entered a plea of guilty of common-law assault, a misdemeanor, in satisfaction of May, 1970 indictments against him and others, including a charge of conspiracy to murder and assault with intent to murder, and he was sentenced to a term of five years in the custody of the Department of Correction; but the sentence was suspended and he was released on condition of good behavior for five years. In respect of this, the sentencing judge said, "If, as Mr. Kunstler suggests, Mr. Turco intends to leave Maryland and take up his activities elsewhere, I can see no useful purpose to be served by active supervision by the Probation Department."

Thereafter, on March 8, 1972 in the Criminal Court of the City of New York, New York County, respondent entered a plea of guilty of unlawful possession of a weapon in violation of section 265.05 of the Penal Law, as a misdemeanor, in satisfaction of multiple charges made against him and another in February, 1970, including possession of dangerous weapons and drugs, and, later, bail jumping and fleeing the jurisdiction, and he was given a sentence of conditional discharge He continued to practice law in the Monroe County area.

Under date of May 8, 1973, following a year-long investigation, the Monroe County Bar Association filed a petition with this court attach-

ing thereto the proceedings underlying the above convictions, and asked this court to determine whether respondent should be disciplined by reason of such convictions. Respondent appeared, interposed an extensive answer and moved for change of venue to the First Department, and, in case that was denied, for a hearing on the validity of the convictions as predicates for disciplinary proceedings. We denied the motion for change of venue and received briefs on the question of the right of respondent to present evidence to prove that in fact he was not guilty of the crimes for which he was convicted. In support of his contention, respondent relied on North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162.

We concluded that the *Alford* case does not support respondent's contention; that in *Alford*, supra, the court merely held that it is proper for a court to accept a defendant's plea of guilty to a lesser crime in compromise of an indictment, provided the plea is voluntarily made (see, accord, People v. Clairborne, 29 N.Y.2d 950, 329 N.Y.S.2d 580, 280 N.E.2d 366; People v. Foster, 19 N.Y.2d 150, 278 N.Y.S.2d 603, 225 N.E.2d 200; People v. Griffin, 7 N.Y.2d 511, 199 N.Y.S.2d 674, 166 N.E.2d 684). As we shall point out later herein, no claim is made, nor can there be, that either of respondent's above guilty pleas was involuntary.

Although respondent suggested that his pleas were reluctantly made and were similar to pleas of *nolo contendere* and hence of no effect in another proceeding (see Matter of Kimball, 33 N.Y.2d 586, 347 N.Y.S.2d 453, 301 N.E.2d 436), the plea of *nolo contendere* has been abolished in New York (Ando v. Woodberry, 8 N.Y.2d 165, 170, 203 N.Y.S.2d 74, 78, 168 N.E.2d 520, 523) and the records of respondent's pleas show conclusively that they were nothing less than pleas of guilty to reduced charges to avoid convictions for the more serious charges and the severe sentences likely to be imposed thereon. We ruled, therefore, that in the absence of a contention that respondent has evidence "which was unavailable to him" at the time of those pleas (see Matter of Keogh, 17 N.Y.2d 479, 481, 266 N.Y.S.2d 984, 985, 214 N.E.2d 163, 164) the convictions were final and binding upon him. We concluded that the acts to which respondent pleaded guilty constitute professional misconduct on his part in violation of Canons of Professional Ethics, Nos. 29 and 32, Judiciary Law Appendix, and of the Code of Professional Responsibility, Disciplinary Rules No. 1–102(A)(3), (5) and (6), Judiciary Law Appendix, namely, that a lawyer should strive at all times to uphold the honor and maintain the integrity of the profession and will find his highest honor as an honest man and as a patriotic and loyal citizen, and that he will engage in no illegal conduct involving moral turpitude or that is prejudicial to the administration of justice or that adversely reflects on his fitness to practice law; and that for such misconduct, respondent must be

disciplined. We gave respondent the opportunity, however, to have a hearing in mitigation of the discipline to be adjudged.

Respondent requested such a hearing, and a justice of the supreme court was designated to hear and report the evidence presented on such hearing. The hearing was held over a period of seven days and is contained in 800 pages of minutes. Respondent called over 45 witnesses, about 40 of whom were from the Rochester area who did not know respondent before he came to Rochester in 1971 and did not know anything of his prior conduct. They testified to his high ability as a lawyer and his good character. The hearing justice gave respondent full leeway and opportunity to explain his conduct and his reasons for pleading guilty. Respondent's testimony and supporting evidence submitted in refutation of the evidence which the State's Attorney in Maryland and the District Attorney in New York stated to the respective courts that they would present on trial of respondent if he did not plead guilty, was detailed and quite complete. In consideration of the matter of mitigation we have reviewed the evidence underlying the charges against respondent which led to his plea of guilty in each of his convictions, and his explanations thereof.

In 1968, soon after he was admitted to the Bar, respondent began employment by William Kunstler in Manhattan. He soon was engaged in representing the Black Panther Party. He testified that Messrs. Kunstler, Lefcourt and he were the first attorneys to represent the Black Panthers on the East coast of the United States, that their services required respondent's appearance in various cities from New England southerly in the East coastal States to Maryland, and that the services were rendered for little or no fee, as the circumstances required. He also represented other indigent persons. He assisted Mr. Lefcourt in a nine-months' trial of the so-called "Panther 21" in New York City.

In February, 1969 members of the Black Panther Party in Baltimore, Maryland were accused of arson, bombing and other crimes. Members of that Party who were residents in New York were extradited to Maryland, and respondent went there to represent them. From the statement of testimony which the State's Attorney of Maryland advised the Criminal Court of Baltimore, at the time of respondent's conviction there, that he was prepared to present against respondent upon his second trial and which respondent stipulated would be the testimony against him, it appears that in the early summer of 1969 respondent was engaged in rendering more than normal legal services for the Black Panthers in Maryland. He joined members of the Black Panther Party on the streets of Baltimore in passing out editions of the Panther paper; he presided over political action classes of the Black Panther Party; and he took an active part in the activities of that Party there. He testified that he also traveled to many eastern United States cities, setting up police control dis-

tricts, a project sponsored by the Black Panthers, and he advised the Party in connection therewith.

It was stipulated before the Maryland court that if the second trial of respondent were to proceed, the State's witnesses would testify to the following facts:

In early July, 1969 one Eugene Leroy Anderson joined the members of the Black Panther Party and respondent in the distribution of Black Panther literature on the streets of Baltimore. On July 10 Anderson appeared at the Black Panthers' headquarters in Baltimore and became involved in an argument with certain members there. It appears that a Captain of the Panthers had been demoted and some members wanted him restored. There was also suspicion that some members were divulging to the police certain Black Panther activities. A number of Black Panthers forcibly carried Anderson upstairs, followed by respondent. There Anderson was slapped, punched and beaten. On one occasion he fell against a file cabinet and respondent grabbed him and threw him to the floor, and another member kicked him in the groin causing him to yell out in pain. A cloth was stuck in his mouth to quiet him. Water in a pan was brought to a boil, sugar was put into it and a hunting dagger was heated in it. The dagger was then placed in the skin under his eye and turned "rolling it down the face, which removed the first layer of skin on Anderson's face". The same thing was then done to his chest. A member took Anderson by the head, placed a .38 caliber revolver against it and said that he was going to kill him. Another member lit a cigarette and placed it against Anderson's face under his eye, burning him. Members present, including respondent, continued beating Anderson, sometimes with bed slats. Respondent then said, "We can't keep him here; we have to off him", meaning "We have to get rid of him [Anderson], we have to kill him." Anderson was kept there under guard all night and the next day, and was tied up and put in a closet. Anderson was called a "pig" who had been caught—apparently squealing.

Two Black Panther members, Loney and Wyche, who had supported the demoted Captain, were berated by one Mitchell. Respondent was present at the time and encouraged Mitchell in his derogatory remarks against them. Mitchell and respondent told them that they could get back in the good graces of the Party by disposing of Anderson and respondent told them to "go ahead and do what they had to do with Anderson".

The State's Attorney stated to the court that Loney would testify that Wyche and he, with one Johnson, then drove out to find a spot where they could kill Anderson, and they found one. That night after respondent had finished presiding over a Black Panther political action class, he told Wyche and Loney to "go and do what you have to do", meaning "get rid of Anderson". Later that night, July 11, Wyche, Loney, Johnson, Young and another got a gun and took

Anderson in an automobile to the spot previously selected. Loney stayed in the car while the others took Anderson into the woods. Loney heard the gun blast, and the escort soon returned without Anderson. Wyche reported that he had shot Anderson.

The State's Attorney stated that another witness, Barbara Zentz, would testify that she expected respondent to come to her house that evening on a social visit. He was late, and she fell asleep waiting for him. He came after 1:30 A.M. on July 12 and awakened her. He was extremely agitated and had a revolver in his hand which he waved, and he said that if "they" (meaning the authorities) came to get him, "he would take some of them with him." He asked her to hide him but she declined.

In October, 1969 the body of Anderson was found in Leakin Park, Baltimore, and it was duly identified.

On February 22, 1970 in Manhattan, New York the police, acting on a tip, apprehended four adults and found that one of them was carrying an automatic gun. They arrested the four and were about to place them in police cars to take them to the stationhouse when three other men appeared, one being Alan Weiser, a lawyer. He told the police that they had no right to arrest the four or take them in, and he stood between the men and the police cars to prevent such police action. The other two with Weiser aided him, and so the police also arrested the three. Weiser gave his address as 674 W. 161st Street, Apartment 6-G.

Officers Valois and Nichols then went to that apartment and knocked. Someone within asked who was there, and they replied, "Police officers". It happened that there was an uncovered peephole in the door, and Officer Valois looked in and saw a man standing there holding a gun in his hand. The man (James Grace) dropped the gun and started running down the hall of the apartment. Officer Valois broke into the apartment and found that the gun was a M-1 carbine loaded with a banana clip of 30 rounds of bullets. He caught Grace in the kitchen and he called out that everyone was under arrest. Respondent and two girls then came out of a door near the kitchen. In the living room the officers saw a shotgun leaning against the window and 12 live shells on the windowsill; and they found on an end table two plastic bags, one containing marijuana and the other 125 green pills. While Officer Nichols was lining up his prisoners he heard a door open to his left. He looked and saw in a room next to the kitchen holstered revolvers and bandoliers full of shells on top of a valise only about five feet from him. He immediately seized them.

Respondent then spoke up, saying, "What are you guys doing? All these guns are registered." Officer Nichols said, "What about the small guns?", and respondent answered, "These weapons are all mine and they are all registered." Respondent admitted that he and his

girlfriend, whom he later married, were also living in the apartment. The officers found 75 hypodermic needles in the apartment; and they learned that the revolvers were not registered or licensed.

On February 23, 1970 Weiser and respondent were charged with possession of dangerous weapons, dangerous drugs, hypodermic instruments and obstructing government administration. Respondent pled not guilty and he was released on bail. His motion to suppress the guns, ammunition, drugs and his statements that the guns were his was denied.

On the mitigation hearing herein respondent testified that in the course of his activities in behalf of liberal causes he made many speaking appearances and that in late April, 1970 he went to Montreal, Canada to make a speech at McGill University, intending to return in a day or two. The fact that he was out on bail did not deter him from leaving the State without permission. He did not, however, speak in Montreal.

On May 1, 1970 respondent was indicted in Maryland along with Mitchell, Wyche and another for conspiring to murder Eugene Leroy Anderson on July 11, 1969; and he also was indicted with Mitchell and others for assaulting Anderson with intent to murder him and for common law assault. Respondent testified that McGill University cancelled his speech on learning of his indictment. Respondent learned of the indictment almost immediately and he testified that through an associate attorney in Baltimore he unsuccessfully negotiated to be released on bail if he returned to Maryland.

Respondent remained in Canada for 7½ months. During this time he forged a lost identification card which came into his possession, falsifying it as his own, and he assumed the name of Leon Wright. He made no attempt to appear in the case pending against him in Manhattan and his bail there was forfeited. In mid-October, 1970 an official in Canada was kidnapped, a state of emergency was declared and the police investigated thousands of persons. In the course of this investigation respondent was "picked up" and he gave his name as Leon Wright, using his false identification card. His identity was discovered, however; and the police, on learning that he was under indictment for murder in Maryland, notified the Maryland authorities, and they began an extradition proceeding against him.

In the course of such extradition proceeding respondent signed a waiver, and in mid-December, 1970 he returned to Maryland with two Maryland police officers, where he was kept in jail until the end of his three weeks' trial in June and July, 1971. The jury acquitted the other defendants indicted with respondent, but they disagreed as to him. He was then released on bail, awaiting a new trial, and in the following month he first came to Rochester, as before stated. Although the other above-mentioned persons indicted with respondent

were acquitted, one Irving Young was tried separately for the murder of Eugene Leroy Anderson and he was convicted thereof.

In February, 1972 the State's case against respondent in Maryland came on for retrial. At that time on February 14, 1972 respondent was represented by Mr. Buchman of Baltimore and Mr. Kunstler of New York. Only one of the four indictments (Nos. 2313, 2314, 2315, 2316) against respondent was called for trial, to wit, No. 2314, and Mr. Buchman stated that respondent would plead guilty to the second count thereof, that is, common law or simple assault, in satisfaction of all the indictments against him. The State's attorney told the court that the State recommended accepting the plea, being mindful that the first trial took three weeks and that the second trial would probably take longer, that respondent had already spent many months in jail awaiting the first trial, and that by pleading guilty to assault respondent was exposing himself to sanctions by the Bar Association of the State of New York and would be subject to disbarment proceedings in New York. Before considering whether the court would accept respondent's plea with the State's approval, Presiding Judge J. Harold Grady had respondent sworn and he questioned him to ascertain whether his plea was voluntarily made. The court elicited that respondent was an attorney at law and fully acquainted with the law of his case and his legal rights and had thoroughly discussed his case with his attorneys before offering to make his plea and was doing so voluntarily.

The court then called upon the State's attorney to present for the record the evidence which the State asserted supported the guilty plea. The State's attorney stated that respondent's attorney had stipulated that the evidence which the State's attorney was about to recite, including the names of the respective witnesses, would be the State's proof if the case proceeded to trial, and respondent's attorney agreed that such was the stipulation. The substance of such testimony was set forth above in describing the events surrounding the beating and shooting of Eugene Leroy Anderson. The testimony also described the use by respondent of the falsified identification card in Canada and the false name of Leon Wright and the fact that he remained in Canada for 7½ months until termination of the extradition proceedings against him.

Following such statement of the State's evidence, Mr. Kunstler, for respondent, stated the nature of the evidence which the defense would present were the case to proceed to trial. He stated that he would present evidence to show that respondent was in New York City, not Baltimore, on July 10 through July 12, 1969; and Mr. Kunstler stated that respondent contends that "he was totally innocent of all the charges". The court then said:

"It was my understanding from the conversation I heard that the defendant would not contend that there was no factual basis for the

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plea and that it was being entered to avoid litigation. It was specifically agreed that the guilty plea was not to be similar to the type approved by the Supreme Court in North Carolina v. Alford. It was my understanding there was to be no contest as to the basic fact that an assault was committed by the defendant."

* * * * * * * * * *

"As I understand it, when the factual statement was to be made by the State there would be no contest as to the facts. Up to the time of the very end of your statement, when you said Turco himself would testify, your recitation of what the witnesses would say could be covered by a finding that there was a factual basis. But if Mr. Turco's position is he does not feel in any way that he has ever done anything wrong and wishes to assert that position on the record, apparently the State is not prepared to follow through with its recommendation on that basis.

"MRS. O'CONNER: Correct. We would ask the entire portion starting 'If Mr. Turco were called to the stand . . .' to be deleted at this point and the plea continue with the completion of the last witness, Mr. Clark.

"MR. KUNSTLER: I would agree to that."

The court then stated:

"So that there be no misunderstanding of the state of the record in this case, at the outset of the State's recital of its evidence there was a stipulation that this would be the State's evidence as produced on direct examination. There has been no stipulation or agreement by the State as to what the evidence offered by the defendant might be, so that there has been no stipulation on the part of the State to any evidence which would support the outline as given by Mr. Kunstler. Since the State's outline of its evidence clearly supports the plea of guilty, the crime of assault, and since the defendant elects to present no evidence to controvert this charge, the Court finds that there is in fact a factual basis for the plea of guilty to the crime of assault."

Before pronouncing sentence, the court concluded as follows:

"As has been pointed out in the discussion here today, the defendant, Arthur Turco, is not a member of the Bar of the State of Maryland. However, I believe that there have been some suggestions that he has offered his services as an attorney to some persons in this jurisdiction who are charged with criminal offenses. The possibility of Mr. Turco participating in the defense of any criminal case in this State would depend upon his being presented to the Court by local counsel with a request that he be permitted to participate in that one case only on a case-to-case basis. Speaking for myself only, and not attempting to speak for any other court in

this jurisdiction, I would make it clear that if such an occasion would arise in the future, Mr. Turco would not be permitted by this Court to act as counsel in any criminal case at trial before this Court."

On March 8, 1972 respondent appeared in the criminal court of the City of New York, New York County, and offered to plead guilty to illegal possession of a dangerous weapon, a gun, in satisfaction of all charges against him, including bail jumping and fleeing the jurisdiction. His attorney, Mr. Lefcourt, stated that respondent had no knowledge of the presence of the handguns or marijuana in his apartment where he was arrested and that the hypodermic needles were for respondent's use as a diabetic. He did not attempt to explain why 75 hypodermic needles were needed for such purpose. He asserted that his plea was under North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162, supra, and that respondent still claims that he was innocent.

The District Attorney replied that the facts "clearly demonstrate the guilt of the defendant", and he proceeded to recite them, as reviewed above; but he concluded by stating that he was willing to accept the one plea in full satisfaction of all charges against respondent. Respondent's attorney stipulated that the People's witnesses would testify to the facts recited by the District Attorney.

The court then questioned respondent and ascertained that his plea was made freely and knowingly; and he added, "After having entered this plea, do you understand I will not permit you to withdraw it under Alford v. North Carolina, on the basis of your assertion of innocence, later on?"; and respondent answered, "I understand, your Honor."

Respondent appealed from the judgment convicting him in Maryland. The appeal was argued on March 2, 1973 and on June 13, 1973 the Court of Special Appeals of Maryland affirmed the judgment.

Respondent appealed from the judgment convicting him in New York County of illegal possession of a dangerous weapon, and on December 19, 1972 the Appellate term of the First Department unanimously affirmed the judgment.

With respect to the New York County conviction respondent testified on the mitigation hearing that he had moved into the Manhattan apartment only a few days before his arrest; that he brought with him two guns, the shotgun and the rifle, which he had formerly used for hunting; and that he registered them when he moved to Manhattan. He stated that the revolvers and ammunition therefor were in the room of his co-defendant, Weiser, in the apartment and their presence was unknown to respondent. He admitted that he had in the apartment up to 200 shells for his shotgun and up to 150 shells for his rifle. He testified that when he told the officers that the guns were

his he was referring only to the shotgun and rifle and not to the unlicensed revolvers, despite the officer's testimony that respondent's statement was in response to his question about the small guns. Respondent offered no explanation of how the shotgun and the rifle, purportedly used only on rare occasions for hunting, were both in the living room with live ammunition in them and openly at hand.

Respondent further testified that the reason he falsified the identification card in Canada and carried it and used the name of Leon Wright was to avoid arrest and extradition to the United States.

Respondent reiterated on cross-examination that he pled guilty in Maryland and in New York County with full knowledge of the charges, facts, and law, and did so voluntarily and on advice of his counsel.

The essence of respondent's testimony on the mitigation hearing was (1) that because of his active defense of minority persons in Maryland, especially blacks, he could not get a fair trial there, and that is principally why he pled guilty rather than stand trial. His wife's ill health and his lack of funds for counsel fees for his defense were also stated as important considerations; (2) that his wife's ill health and the expense of defending himself against the New York County charges were also why he pled guilty there; (3) that he has been devoted to the defense of minority groups and underprivileged persons largely without fee, and has performed a public service for which he should be commended instead of being charged with unprofessional conduct; and (4) that since his convictions he has conducted himself in an exemplary manner, continuing to defend the poor and defenseless and unpopular causes, and should be permitted to continue to do so.

The petition herein charges respondent with misconduct by reason of the two convictions above described. We have determined that such misconduct requires that he be disciplined. In an effort to mitigate the discipline to be adjudged, respondent presented his version of the facts underlying and surrounding the convictions. In considering such testimony we necessarily have reviewed the countervailing proof, to wit, the facts which the State of Maryland and the People of New York stated that they would prove upon a trial to establish respondent's guilt, many of which facts were admitted by respondent or not denied. Those alleged facts and respondent's answers thereto are necessarily weighed by us in considering respondent's character and his respect for the law and his responsibility to the Bar as a lawyer.

The Maryland court accepted the recommended plea of common assault; but it clearly did not view the crime as a mere street corner fist-fight, for it imposed a five-year sentence, suspended during respondent's good behavior. After respondent's arraignment in New

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York County on the various charges there, the court recognized respondent's position as a member of the Bar and released him on bail on his own recognizance, thus relying on his integrity as an attorney-at-law to abide by the rules governing persons released on bail and to be available at all times for the prosecution of the case. Under such circumstances his admitted jumping bail, which in itself constituted the commission of a felony (Penal Law, § 205.40), shows a significant lack of good character. Although this fact is not a basis upon which the petition rests, in his testimony in mitigation respondent has adverted to his *incognito* stay in Canada, and such testimony must be considered in light of all the surrounding facts.

The evidence in behalf of respondent shows that he engaged in representing people who desperately needed representation and who often had difficulty finding able counsel, and that he, as an attorney, had a proper concern for underprivileged persons. The testimony of the many witnesses who testified to respondent's good character must, however, be recognized as based upon his conduct since he came to Rochester in 1971, during which time he was subject to the Maryland and New York County charges or the pressure of the Bar Association's investigation for his prior misconduct. Were the admitted facts in this proceeding to appear on the record of an applicant for admission to the Bar, without doubt the application would be summarily denied.

In his argument in mitigation of respondent's conduct and consequent punishment, his counsel likens respondent's actions to those of an attorney who has been charged with tax fraud or tax evasion. We cannot accept such comparison. Defendant has been charged with crimes involving gross moral turpitude, including violence and a display of utter lack of moral responsibility. Even in his testimony at the mitigation hearing he evinced no showing of remorse or recognition of wrongdoing. Respondent's conduct in 1969 and 1970, as recited above, reveals that he had little respect for legal processes insofar as they applied to him and his ambitions. He left the arena of the lawyer in the proper defense of clients charged with crime and joined his clients in criminal activity and when caught in the web of the law, he refused to abide by lawful mandates and undertook illegal means to evade the law and conceal himself. He flouted the law. His actions were completely un-lawyerlike, unprincipled and far below any minimum standard of proper professional conduct. Such conduct in a practicing lawyer cannot be tolerated. For his admitted actions herein we have no choice but to order that he be disbarred and that his name be stricken from the roll of attorneys of the State of New York.

An order should be entered accordingly.

Order of disbarment entered.

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Ex.G

APPELLATE DIVISION

OF THE

Supreme Court

STATE OF NEW YORK

FOURTH JUDICIAL DEPARTMENT

PRESENT: MARSH, P.J., BOULE, SIMONS, MAHONEY, DEL VECCHIO, JJ.

In the Matter of Arthur F. Turco, Jr., an Attorney, Respondent,

Monroe County Bar Association, Petitioner.

This Court by order entered December 17, 1973 having found respondent guilty of professional misconduct in his office as an attorney and counselor at law, and by order entered January 17, 1974, having appointed the Honorable Lyman H. Smith, Justice of the Supreme Court, to take such proof as respondent may offer in mitigation of the discipline to be adjudged, and upon the report of Honorable Lyman H. Smith dated October 25, 1974, and after hearing Michael T. Tomaino, of counsel for the petitioner, and Herald Price Fahringer, of counsel for the respondent, and due deliberation having been had thereon,

It is hereby ORDERED, That the said Arthur F. Turco, Jr., who was admitted to practice as an attorney and counselor at law in the First Judicial Department on December 21, 1967, be, and he hereby is, removed from his office as attorney and counselor at law, and his name is hereby ordered to be stricken from the roll of attorneys and counselors at law in the State of New York, and the said Arthur F. Turco, Jr. is hereby commanded hereafter to desist and refrain from the practice of law in any form, either as principal or agent, clerk or employee of another, and is hereby forbidden to appear as an attorney or counselor at law before any court, judge, justice, board, commission or other public authority, or to give to another an opinion as to the law or its application, or any advice in relation thereto.

Per Curiam Opinion, which is hereby made a part hereof.

All concur.

Enter.

Entered: January 28, 1975

Exhibit "G"

LESTER A. FANNING, Clerk

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State of New York,
Court of Appeals

EX. H

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth *day of* February *A. D. 1975.*

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

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4 Mo. No. 154
In the Matter of
Arthur F. Turco, Jr.,
Appellant,
vs.
Monroe County Bar Association,
Respondent.

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied, and it is

ORDERED, on the Court's own motion, that the appeal taken as of right be dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

Joseph W. Bellacosa
Clerk

EXHIBIT "H"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

61a

ARTHUR F. TURCO, JR.,

Plaintiff,

vs.

THE MONROE COUNTY BAR ASSOCIATION; THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT; JOHN S. MARSH, REID S. MOULE, RICHARD J. CARDAMONE, HARRY D. GOLDMAN, RICHARD D. SIMONS, WALTER J. MAHONEY, FRANK DEL VECCHIO, and G. ROBERT WITMER, Presiding Justice and Justices of the Appellate Division of the Supreme Court, Fourth Judicial Department; and LESTER FANNING, Chief Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department,

Defendants.

Civil Action

No. 75-100

AMENDED COMPLAINT

I. PARTIES

A. Plaintiff

1. Plaintiff, Arthur F. Turco, Jr., is a citizen of the United States and a resident of the State of New York, City of Rochester.

B. Defendants

2. The defendant, Monroe County Bar Association, is, upon information and belief, an unincorporated association of attorneys and maintains its offices for the conduct of its affairs at the Reynolds Arcade, Rochester, New York.

3. The defendant, the Appellate Division of the Supreme Court, Fourth Judicial Department, is established pursuant to the laws of the State of New York. The Appellate Division has original

jurisdiction concerning matters of attorneys' admission to the Bar and any disciplinary actions concerning attorneys.

4. The defendants, John S. Marsh, Reid S. Moule, Richard J. Cardamone, Harry D. Goldman, Richard D. Simons, Walter J. Mahoney, Frank Del Vecchio, and G. Robert Witmer, are the Presiding Justice and the Justices of the Appellate Division of the Supreme Court, Fourth Judicial Department. The defendant, Lester Fanning, is the Chief Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department.

II. JURISDICTION

5. This is an action for injunctive and declaratory relief under Rule 57 of the Federal Rules of Civil Procedure, authorized by Title 42 U.S.C., Sec. 1981 et seq., to secure rights, privileges, and immunities established by the Fourteenth Amendment to the Constitution of the United States. Jurisdiction is also conferred on this Court by Title 28, U.S.C., Secs. 1331, 1332, and 1343(3) and (4), providing for original jurisdiction of this Court and suit authorized by Title 42, U.S.C., Secs. 1983 and 1985. Jurisdiction is further conferred on this Court by Title 28, U.S.C., Secs. 2201 and 2202.

III. STATEMENT OF FACTS

6. In or about April 1972, pursuant to an order by Presiding Justice Harry Goldman of the Appellate Division of the Supreme Court, Fourth Judicial Department, Alex Gossin, Esq., a member of the Monroe County Bar Association, Grievance Committee, was ordered to investigate and report to the Appellate Division two misdemeanor convictions concerning the plaintiff herein.

7. Several times thereafter, Alex Gossin spoke with the plaintiff herein concerning the two misdemeanor pleas. Plaintiff spoke at length with Mr. Gossin, explaining all the surrounding

circumstances of said pleas, and also informed Mr. Gossin that he could present evidence concerning his innocence. Alex Gossin agreed at a future time and date to meet with the plaintiff herein to examine said evidence.

3. On May 8, 1973, the Monroe County Bar Association filed a petition charging the plaintiff with two misdemeanor convictions. The petition was filed in the Appellate Division, Supreme Court, Fourth Judicial Department.

9. The petition filed by the Monroe County Bar Association charges the plaintiff with two guilty pleas, both misdemeanors.

10. In September, 1973, the plaintiff moved to dismiss the petition, or in the alternative for a full evidentiary hearing on these charges since he had interposed pleas of guilty under the case of North Carolina v. Alford, 400 U.S. 25, in which he was allowed to assert his innocence while taking the pleas.

11. The Appellate Division on December 17, 1973, rejected the contentions raised and the motion to dismiss, and concluded that by reason of the pleas of guilty, the plaintiff had violated the canon of professional ethics, that he was not allowed a full hearing to explain, and go behind the pleas of guilty, but that they would allow the plaintiff a mitigation hearing on character only.

12. On March 28, 1974, the mitigation hearing was commenced before the Hon. Lyman H. Smith, a Justice of the Supreme Court of the State of New York, and was continued from time to time until May 21, 1974, when it was concluded.

13. During the mitigation hearing, there was no evidence whatsoever produced concerning the guilt of plaintiff to the two misdemeanor pleas.

14. During said mitigation hearing, there was no evidence whatsoever produced concerning anything negative about plaintiff's character.

15. At the conclusion of the mitigation hearing, plaintiff's attorney, Herald P. Fahringer, read to the hearing officer all the evidence that plaintiff would produce to show that he was innocent of the two misdemeanor charges. However, Judge Lyman Smith said that he could not accept such evidence pursuant to the Appellate Division order dated December 17, 1973.

16. Judge Smith's report was filed on October 25, 1974, with the Appellate Division, Fourth Department. Judge Smith, who was directed by the Appellate Division to report his findings to the Court without recommendations, summarized his conclusions by stating:

> "His dedication to and professional representation (after admission to the bar) of indigent black defendants without financial reward and at considerable risk to his personal reputation (and, inferentially, to his personal safety) during a volatile period in the 1960's marked by racial and ethnic confrontation, and by student unrest, not only in the United States but throughout the world."

After said mitigation hearing and Judge Smith's filing his findings with the Appellate Division on October 24, 1974, plaintiff submitted a brief which stated in part that no evidence whatsoever was produced concerning plaintiff's guilt and in light of the fact that 48 witnesses testified on his behalf and over 200 persons signed petitions of his good character, no discipline should be meted out.

17. On January 28, 1975, the Appellate Division, Fourth Judicial Department, rendered its judgment disbaring the plaintiff.

18. The decision of the Appellate Division dated January 28, 1975, disbaring the plaintiff, contains over 14 pages based upon mere allegations which the plaintiff, by the Appellate Division order,

was precluded from refuting. Said allegations, unsupported by any evidence, are totally false.

19. The Appellate Division, by its own order dated December 17, 1973, did not allow plaintiff to go behind the two convictions to prove his innocence; however, by its decision, the Appellate Division went far behind that order and found as fact, mere allegations which the defendant was not even advised that he was being charged with.

20. On February 3, 1975, the Hon. Sol Wachtler, Associate Judge of the Court of Appeals, signed a stay, pending motion to the Court of Appeals for leave to appeal.

21. On February 17, 1975, the plaintiff did submit to the Court of Appeals a motion for leave to appeal.

22. Pursuant to the laws of the State of New York, an attorney is not allowed an appeal to the Court of Appeals as a matter of right, but must seek permission of said Court to appeal.

23. On February 19, 1975, the Court of Appeals of the State of New York denied plaintiff permission to appeal.

24. On February 24, 1975, the original stay granted by Justice Wachtler of the Court of Appeals terminated.

IV. CAUSE OF ACTION

25. The actions of the defendants, as set forth above, have the purpose and/or effect of:

a) Denying to the plaintiff his fundamental rights of due process of law, all in violation of the Fifth, Sixth, Ninth and Fourteenth Amendments of the United States Constitution.

b) The plaintiff was further denied due process of law because his disbarment was based upon allegations unsupported by any evidence. In fact, there is evidence of plaintiff's innocence,

as part of the Court record in the State of Maryland, which the plaintiff offered to introduce, but was precluded by the Appellate Division order dated December 17, 1973.

c) The plaintiff was further denied due process because his disbarment is based upon allegations not contained in the Bar Association's petition of charges against him, thus denying plaintiff the fundamental right of due process of being notified of the charges pending against him.

d) Plaintiff was further denied the fundamental right of due process of law because he was foreclosed from repudiating the allegations which were not contained in the Bar Association's petition but were relied upon by the Appellate Division in its judgment of disbarment.

e) The plaintiff was further denied due process of law and equal protection of the law because his disbarment was discriminatory and based upon mere suspicion and conjecture rather than evidence.

f) The plaintiff was further denied due process of law because the two pleas entered were based upon the doctrine of North Carolina v. Alford, in which the plaintiff asserted his innocence at the time of taking the pleas, and was thus precluded from raising that same question of innocence during said disciplinary proceeding.

g) Plaintiff was further denied due process in that the Appellate Division denied any due process hearing on the question whether misdemeanor convictions established professional misconduct.

h) The plaintiff was further denied due process of law in that the denial by the Court of Appeals of leave to appeal is a

violation of the Constitution of the United States. The Appellate Division, in a disciplinary proceeding, acts as a court of original jurisdiction which, pursuant to the Rules of the Court of Appeals, does not grant an attorney the right to appeal but requires him to seek permission, all in violation of the due process of law provided for in the Constitution of the United States.

26. The actions on behalf of the defendants, Monroe County Bar Association, Appellate Division of the Supreme Court, Fourth Judicial Department, and the individual defendants, the Presiding Justice and Justices of the Appellate Division, and the Clerk of said Division, together, have denied the plaintiff his most fundamental rights of due process and equal protection of the law, as guaranteed by the Fifth, Sixth, Ninth and Fourteenth Amendments to the Constitution of the United States, in that, among other things, the Appellate Division and the Monroe County Bar Association and the individual defendants, by court order, refused to let the plaintiff introduce evidence of his innocence and go behind the two pleas entered, while in the Appellate Division a decision of disbarment, dated January 28, 1975, went far behind said pleas and found as fact, unsupported allegations, while denying the plaintiff the opportunity to disprove said allegations by introducing evidence, part of which is contained as a matter of court record in the State of Maryland.

27. Unless this Court restrains and enjoins the defendants from enforcing their Order of Disbarment, the plaintiff will suffer and continue to suffer serious, immediate, and irreparable injury in that:

a) Said disbarment will have the immediate effect of interfering and impeding efforts of the plaintiff to prepare adequately for the defense of certain defendants now or about to face trial.

b) Said disbarment against the plaintiff will have an immediate and irreparable effect upon the exercise of fundamental due process rights of the Constitution of the United States.

c) The said disbarment of the plaintiff has resulted in serious and irreparable injury to his professional reputation as a lawyer and has illegally and unconstitutionally punished and penalized him without due process of law, as well as subjected him to public scorn and ridicule.

d) The said disbarment of plaintiff has resulted in unemployment and loss of income, which damage threatens his livelihood and that of his wife and two small children.

28. The plaintiff has no adequate remedy at law.

29. No previous application for the relief sought herein has been made to this or any other Court.

WHEREFORE, plaintiff prays for the following relief:

1. That a permanent injunction be issued:

a) Restraining the defendants and each of them, their agents, employees and attorneys and all others acting in concert with them and their successors, from enforcing the Order of Disbarment dated January 28, 1975, by the Appellate Division of the Supreme Court, Fourth Judicial Department.

b) That a Declaratory Judgment issue declaring that the denial of the right of appeal by the State of New York, as applied to attorneys pursuant to New York Judiciary Law, Sec. 90, and Article 6, Sec. 3 of the New York Constitution, when the Appellate Division is sitting as a court of original jurisdiction, is unconstitutional and a denial of due process of law, as defined by the Constitution of the United States.

2. That this Court grant plaintiff such other and further relief as may seem to it to be appropriate.

Dated: May 29, 1975.

Attorneys for Plaintiff

MORTON STAVIS
744 Broad Street
Newark, New Jersey 07102

CHARLES GARRY
1256 Market Street
San Francisco, California

RAMSEY CLARK
Attorney of Counsel for Plaintiff
37 West 12th Street
New York, New York

LEONARD I. WEINGLASS
Attorney of Counsel for Plaintiff
2902 1/2 Ocean Front Walk
Venice, California

WILLIAM M. KUNSTLER
Attorney of Counsel for Plaintiff
853 Broadway
New York, New York 10003

MARGARET L. RATNER
Attorney of Counsel for Plaintiff
351 Broadway
New York, New York

DORIS PETERSON
Center for Constitutional Rights
853 Broadway
New York, New York 10003

ROBERT NAPIER
620 Reynolds Arcade
Rochester, New York

By: _____
Morton Stavis

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

ANTHONY F. TUSCO, JR.,

Plaintiff,

-against-

[illegible] COUNTY BAR ASSOCIATION; THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT; JOHN L. S. ROCH, REID C. YOUNG, RICHARD J. [illegible], LARRY D. COLLINS, RICHARD D. [illegible], WILLIAM J. [illegible], [illegible] DEL VECCHIO, and C. [illegible] HUTH, Presiding Justice and Justices of the Appellate Division of the Supreme Court, Fourth Judicial Department; and [illegible] MEWING, Chief Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department,

Defendants.

NOTICE OF MOTION

Civil Action No. 75-100

PLEASE TAKE NOTICE that the Defendants, the Appellate Division of the Supreme Court, Fourth Judicial Department and the individually-named Justices and Chief Clerk thereof, will move this Court at a Term thereof to be held at the United States District Court for the Western District of New York located in the City of Rochester, New York on July 23, 1975, at 10 o'clock a.m., or as soon thereafter as counsel can be heard, for an order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure dismissing the amended complaint herein by reason of the District Court's lack of jurisdiction over the subject matter of this action and over the Defendants Appellate Division, Fourth Judicial Department and the Justices thereof, by reason of the plaintiff's failure to state a claim upon which relief can be granted and upon the

basis of res judicata, collateral estoppel and upon the provisions of the United States Constitution, Article 4, § 1, and for such other and further relief as may be just and proper.

Dated: July 3, 1975

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
Appellate Division, Fourth
Department and the Justices
and Chief Clerk thereof

By [signature]
WILLIAM J. KOGAN
Assistant Attorney General
Office & P. O. Address
The Capitol
Albany, New York 12224

TO: MORTON STAVIS, Esq.
744 Broad Street
Newark, New Jersey 07102

MICHAEL S. TOTARO, Esq.
Nixon, Hargrave, Devans and Doyle, Esqs.
Lincoln First Tower
Rochester, New York 14603

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

72a

ARTHUR F. TURCO, JR.,

Plaintiff

- vs -

CIVIL 75-100

THE MONROE COUNTY BAR ASSOCIATION, THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, JOHN S. MARSH, REID S. MOULE, RICHARD J. CARDAMONE, HARRY D. COLEMAN, RICHARD D. SIMONS, WALTER J. MAHONEY, FRANK DEL VECCHIO, and G. ROBERT WITMER, Presiding Justice and Justices of the Appellate Division of the Supreme Court, Fourth Judicial Department, and LESTER FANNING, Chief Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department,

Defendants

Martin Stavis
744 Broad Street
Newark, N.J. 07102

and

Robert Napier
620 Reynolds Arcade Building
Rochester, N.Y. 14614
Attorneys for plaintiff

Michael J. Tomaino
Lincoln First Tower
Rochester, N.Y. 14603
Attorney for Monroe County Bar Association

Louis J. Lefkowitz
Attorney General of New York
The Capitol
Albany, N.Y. 12224
Attorney for defendants Appellate Division, Fourth Department and the Justices and Chief Clerk thereof (William J. Kogan, Assistant Attorney General, of counsel)

The complaint herein was filed March 11, 1975. It prayed for a permanent injunction restraining the defendants from enforcing the order of disbarment dated January 28, 1975 by the Appellate Division of the Supreme Court, Fourth Department, and a declaratory judgment declaring that the denial of the right of appeal by disbarred attorneys is unconstitutional and a denial of due process of law.

The plaintiff filed an amended complaint on May 29, 1975 adding as defendants the Presiding Justice and Justices of the Appellate Division and the Chief Clerk.

The Appellate Division, and the Justices and Chief Clerk thereof, moved to dismiss the amended complaint for lack of jurisdiction over the subject matter and over the defendants Appellate Division, and the Justices thereof, by reason of the plaintiff's failure to state a claim upon which relief can be granted and upon the basis of res judicata, collateral estoppel, and upon the provisions of the United States Constitution, Article 4, Section 1. The motion was submitted for decision on July 28, 1975.

The plaintiff was disbarred by the Appellate Division, Fourth Department, by order dated January 28, 1975. The Monroe County Bar Association brought a disciplinary proceeding before the Appellate Division charging that he had been convicted, on his guilty pleas, of two misdemeanors.

The plaintiff moved to dismiss the petition, or, in the alternative, for a full evidentiary hearing at which he would be allowed to satisfy a fact-finding officer appointed by the court that he was not guilty of those charges. He asserted that he had interposed his guilty pleas under North Carolina vs. Alford, 400 U.S. 25, under which he claimed he could enter a plea while asserting his innocence. On December 17, 1973 the Appellate Division found that by reason of the pleas of guilty the plaintiff had violated a canon of professional ethics, that he was bound by the convictions, and that dispite his reliance on Alford, he did not have the right in a disciplinary proceeding to prove that he was not guilty of the two charges. The court permitted him to have a mitigation hearing if he so requested. A mitigation hearing was held before a Justice of the Supreme Court appointed to conduct the hearing and to report his findings without a recommendation. Neither the hearing nor the Justice's report dealt with the guilt or innocence of the plaintiff of the underlying charges.

Under New York Law a disbarred attorney is not allowed an appeal to the Court of Appeals as of right but must seek permission to appeal. Leave to appeal was sought but was denied by the Court of Appeals on February 19, 1975. The amended complaint alleges that the actions of the defendants

had the purpose and effect of denying plaintiff his fundamental rights of due process of law and equal protection of law in violation of the Fifth, Sixth, Ninth and Fourteenth Amendments to the Constitution of the United States. It further alleges that plaintiff was denied due process of law in that his disbarment was based on allegations unsupported by evidence, that he was precluded from introducing evidence of his innocence, that his disbarment was based upon allegations not contained in petition, that he was denied due process of law in that a guilty plea was considered final and binding as proof of guilt dispite the fact that it was expressly made under Alford, that upon the critical question of whether plaintiff was guilty of professional misconduct the Appellate Division denied him an opportunity for any hearing and adjudicated the issue upon no evidence, that the New York disciplinary statute denying attorneys, unlike all other New York litigants, the right to appeal from disciplinary proceedings as of right, amounted to a denial of the equal protection of laws and is unconstitutional on its face.

Section 90 of the Judiciary Law of New York provides for automatic disbarment of an attorney convicted of a felony. On conviction of a misdemeanor the matter is left to the judgment and discretion of the Appellate Division. A conviction of a misdemeanor may or may not result in disbarment. This inquiry as to whether such a conviction may establish

professional misconduct, plaintiff asserts, requires a full due process hearing.

The plaintiff contends that he was not only denied a hearing on the question whether his misdemeanor convictions warranted a finding of professional misconduct, but that he was denied fair notice of the charges and an opportunity to present witnesses and to confront and cross examine his accusers.

The plaintiff contends that while it is generally true that due process does not require a state to provide litigants with appellate review, the same is not true where the state has failed to provide for a full and fair hearing in the court of original jurisdiction. He contends that the Appellate Division did not afford him at least "one fair hearing" because it adjudicated him guilty of unprofessional conduct without hearing testimony on the critical question whether the guilty pleas established unprofessional conduct, and whether in the light of the pleas, the plaintiff was in fact guilty.

There is no merit to the contention that he was denied equal protection of laws and due process by denial of a right of appeal to disbarred attorneys. Levin vs. Culotta and related cases, Southern District of New York (three judge court judgment), affirmed by Supreme Court of the United States March 29, 1976.

This court should not interfere in state disciplinary proceedings, Erdmann vs. Stevens, 458 F.2d. 1205 (2 cir. 1972), cert. denied, 409 U.S. 889. Anonymous vs. Association of the Bar of the City of New York, 515 F.2d. 427 (2 cir. 1975).

The action is dismissed. The plaintiff shall have a stay for a period of thirty days from the date of this order to afford him an opportunity to appeal. If he shall appeal, he shall have a stay pending the appeal.

SO ORDERED and ADJUDGED.

Harold F. Burke

HAROLD F. BURKE
United States District Judge

June 30, 1976.

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United States District Court

FOR THE

WESTERN DISTRICT OF NEW YORK

FILED

CIVIL ACTION FILE No. 33 75-100

U.S. DISTRICT COURT
W.D. OF N.Y.

ARTHUR F. TURCO, JR.

vs.

THE MONROE COUNTY BAR ASSOCIATION, THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, et al.

JUDGMENT

This action came on for ~~XXX~~ (hearing) before the Court, Honorable Harold P. Burke, United States District Judge, presiding, and the issues having been duly ~~XXX~~ (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the action is dismissed. The plaintiff shall have a stay for a period of thirty days from the date of this order to afford him an opportunity to appeal. If he shall appeal, he shall have a stay pending the appeal.

Dated at Buffalo, New York, this 2nd day of July, 1976.

JOHN K. ADAMS
Clerk of Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

79a

ARTHUR F. TURCO, JR.,

Plaintiff

-vs-

CIVIL 75-100

THE MONROE COUNTY BAR ASSOCIATION, THE APPELLATE DIVISION OF THE SUPREME COURT, FOURTH JUDICIAL DEPARTMENT, JOHN S. MARSH, REID S. MOULE, RICHARD J. CARDAMONE, HARRY D. GOLDMAN, RICHARD D. SIMONS, WALTER J. MAHONEY, FRANK DEL VECCHIO, and G. ROBERT WITMER, Presiding Justice and Justices of the Appellate Division of the Supreme Court, Fourth Judicial Department, and LESTER FANNING, Chief Clerk of the Appellate Division of the Supreme Court, Fourth Judicial Department,

NOTICE OF APPEAL

Defendants

Notice is hereby given that Arthur F. Turco, Jr., the plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment of this Court dismissing the action herein, entered in this action on the second day of July, 1976.

MORTON STAVIS and DORIS PETERSON
Attorneys for Plaintiff

By: _____
MORTON STAVIS

c/o Center for Constitutional Rights
853 Broadway
New York, New York 10003
(212) 674-3303

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 1976, I served two copies of the within Brief and Appendix upon the following, by ordinary mail, with sufficient postage affixed:

William J. Kogan, Esq.
Assistant Attorney General
Department of Law
Albany, New York 12224
Attorney for Appellate Division, et al.

Michael T. Tomaino, Esq.
Lincoln First Tower
Rochester, N.Y. 14603
Attorney for Monroe Co. Bar Association

Morton Stavis